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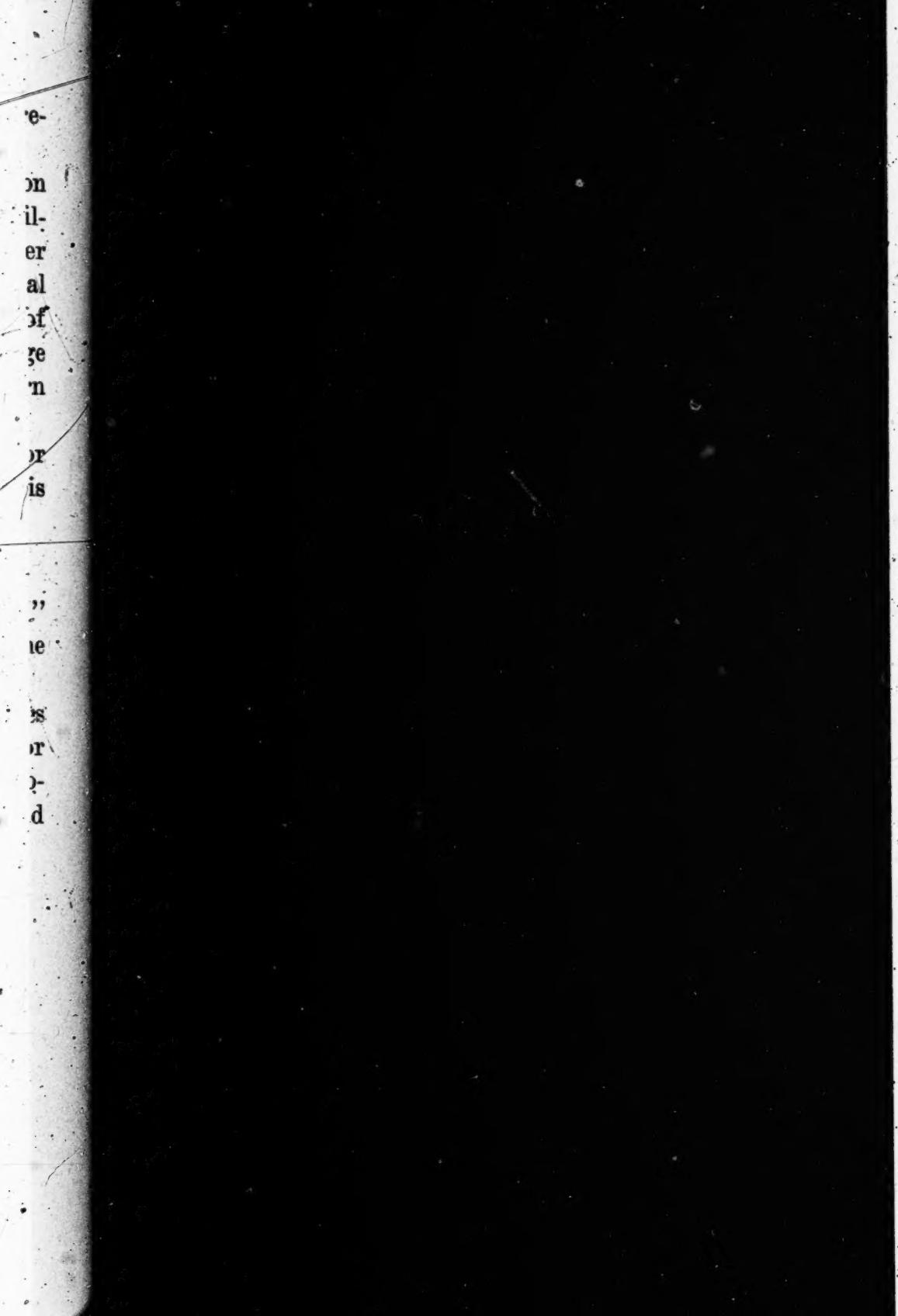

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 6, ORIGINAL

THE STATE OF NEBRASKA, COMPLAINANT

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,
THE UNITED STATES OF AMERICA, INTERVENOR.

BRIEF FOR THE UNITED STATES OF AMERICA, INTERVENOR

JURISDICTION

This is an action between states, in which leave to file the Bill of Complaint was granted on October 15, 1934 (293 U. S. 523). The United States was granted leave to intervene on May 16, 1938 (304 U. S. 545). Original jurisdiction exists under Article III, Sec. 2, cl. 2, of the Constitution of the United States and the Act of March 3, 1911, c. 231, sec. 233, 36 Stat. 1156.

STATEMENT OF THE CASE

This case is now before the Court on exceptions, by all parties, to the report of Michael J. Doherty,

the Special Master; who conducted extensive hearings as outlined at pages 272–273 of his report and who has recommended that a decree be entered apportioning the natural flow water of the North Platte River among the parties in the manner set out at pages 177–180 of his report, based on the conclusions summarized at pages 6–11 of the report.

A concise summary of the pleadings is given at pages 3–4 of the Special Master's report and need not be repeated here.

At pages 11–42 of the Special Master's report appears a summary statement of the systems of water law of the three States which are party to this litigation and of the general facts which underlie the controversy. There (page 20) it is pointed out that the river basin is divisible into six natural sections and, opposite page 19, there is a map showing those sections within the entire river basin. The full consideration of the river and its water problems, as well as the Special Master's recommendations and conclusions, is dependent on that sectionalization of the basin. And, as indicated by the Special Master at pages 21 and 41 and as is developed by him in more detail at pages 53, *et seq.*, the short section of the river between Whalen, Wyoming, and the Tri-State Dam in Nebraska, is the "pivotal section of the entire river". In that section is the greatest concentration of demand for water, a demand the approxi-

mate equivalent of the demand in the entire 415 miles of river basin above it. No water originating or existing above the Tri-State Dam is needed for irrigation below that point. Report, pp. 9, 92–99. This section, then, is the terminus of the river for purposes of this allocation. Furthermore, since it represents such a tremendous and concentrated irrigation demand, it becomes the measure of the need for restrictions on uses in all areas upstream, taking into account, of course, all proper factors bearing on equitable apportionment and rights to the use of water between this and the other up-river sections. Also, this section from Whalen to the Tri-State Dam is one of divided authority and responsibility. It is cut by the state line between Nebraska and Wyoming; part of the lands irrigated from canals diverting in the section lies in one State and part in the other; several of the canals diverting in the section serve lands in both States; and here lie the lands of the North Platte Federal Reclamation Project, partly in both States, which are served by works constructed and operated by the United States (although operation of the canals, *excluding their headgates and diversion works*, has been "turned over" by contract to irrigation districts formed by the water users) and with water the control of which is claimed by the United States and the right to apportionment of which is also claimed

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by the United States as against both the States of Nebraska and Wyoming.

To state all of the pertinent facts of this case at this point, however, would be to burden the brief unnecessarily since the Special Master has well stated the general facts at pages 11–42 of his report,[1] and has developed the detailed facts in a most thorough way at pages 42–99. It seems inappropriate and unnecessary to repeat those facts here or to dwell on those regarding which there may be controversy.[2] As they pertain to specific points of exception they will be stated and correlated in the course of the argument.

The proposals of the parties for disposition of the case and for equitable apportionment, as those proposals were made before the Special Master, are summarized at pages 99–101 of his report and need not be repeated here. In the report the Special Master rejects the detailed proposals for equitable apportionment as made by all parties (pages 113–119) and formulates his own plan of apportionment (pages 125–164). In doing so, however, he maintains and incorporates many of the basic principles contained in various of the

[1] Hereafter in this brief the words "report" or "the report", where used without further definition, refer to the report of the Special Master.

[2] Very few of the exceptions filed by all parties controvert the general facts stated by the Special Master, but a considerable number of the exceptions controvert various of the detailed facts.

proposals. He includes no allocation of water for Nebraska lands served by canals heading below the Tri-State Dam, an omission based on his conclusion that such lands have an adequate supply of water without relying on, or having any equitable right to call on, water originating or existing in the river at any point above the Tri-State Dam (pages 9, 92–99). This principle was basic in the proposals of all parties except Nebraska and was strenuously urged by Wyoming and the United States. Likewise, the Special Master's proposed apportionment embraces the principle that restrictions on uses must be imposed in the area above Whalen to protect both the storage and natural flow rights of appropriators or users in the most concentrated area of irrigation on the entire stream, the area served by diversions from the short river section between Whalen and the Tri-State Dam, and to place the users in that area on an equal plane with users above Whalen. This principle was involved in the proposals of Nebraska and the United States and was urged by them. The Special Master's proposal also incorporates the principle, either urged or conceded by all parties, that natural flow water in the Whalen to Tri-State Dam section must be apportioned and subjected to limitations on its use, although it rejects the related principle urged by Wyoming that storage water also must be apportioned and although it also re-

jects the related principle urged by the United States that the apportionment in the Whalen to Tri-State Dam section must include an apportionment to the United States and not be limited to an apportionment between the States of Nebraska and Wyoming alone.

The exceptions of the various parties, for the most part, are in the nature of perfecting exceptions or go to the mechanism or to the details of the Special Master's proposed apportionment and to the factual conclusions lying behind the details. Nebraska, however, continues to maintain that apportionment should be made for canals heading below the Tri-State Dam (Nebraska Exceptions 2, 14, 18, and 33); Colorado continues to maintain that restrictions should not be placed on uses above Whalen, limiting that position, however, to uses in the State of Colorado (Colorado Exceptions I, II, and III); and the United States continues to maintain that apportionment should include apportionment to it (United States Exceptions I, V, X, and XIII).

PATTERN OF THE BRIEFS

Because of the extensiveness and complexity of the record, the issues and the exceptions in this case, it seems desirable to consider each subject of exception separately. Consequently, in this brief, each exception taken by the United States will be discussed in a separate part in the order of the exceptions themselves, the only departure

from this scheme being where two or more of the formal exceptions relate to the same subject matter, in which instances the related exceptions will be discussed together at the appropriate place for discussion of the first of them. In each part the particular facts pertinent to the exception or exceptions there under discussion will be stated as will the orientation of the exceptions and the stated facts to the over-all aspects of the equitable apportionment involved and the case generally, to whatever extent is appropriate and necessary in each instance.

The extensive record in this case has not been printed. The Clerk of this Court has been advised of agreement among the parties that each will print separately, in the form of appendices to the briefs, those portions of the record on which it relies, all such appendix materials ultimately to be combined in one volume or integrated group of volumes for the convenience of the Court prior to argument. For present purposes those portions of the transcript and exhibits relied on in this brief appear in the separately bound volume labeled "Appendices V and VI to Brief of the United States of America, Intervenor", Appendix V containing the transcript materials and Appendix VI containing the exhibits.

This brief does not contain specific opposition to the exceptions filed by other parties; it is a brief purely in support of the exceptions filed

by the United States. The United States respectfully reserves for its second or answer brief the right specifically to oppose the exceptions of the other parties. No proper or full opposition to such exceptions can be made at this time, prior to or coincident with the filing of briefs by the other parties supporting their exceptions. To have partial opposition here and partial opposition in an answer brief would tend toward confusion.

SPECIFICATION OF EXCEPTIONS TO BE URGED

The United States will urge all exceptions stated by it except the last, number XXV, the point there raised having been eliminated by a correction made by the Special Master in the final printing of his report.

Numbered as they are in the formal exceptions but stated without inclusion of the grounds or reasons for them, the exceptions on which the United States relies go to:

I. The conclusion of the Special Master contained in paragraph 5 on page 9 of the report that "the claim of Nebraska" to be recognized by the Court includes that asserted

> on account of lands supplied by the so-called North Platte Project Canals whose headgates are located at Whalen, Wyoming.

II. The conclusion contained in paragraph 7 at pages 9 and 10 of the Special Master's report,

in that it does not find or conclude that equity requires any restraint on the uses of water on tributary streams entering the North Platte River between Pathfinder Reservoir and Guernsey. This omission is, in turn, based on the conclusions stated at pages 52 and 145–146 of the report that use of tributary water in this area is not of such a present or threatened future nature as to justify regulation, to which conclusions the United States also excepts and objects.

III. The conclusions expressed in paragraph 9 of the Special Master's conclusions, at page 10 of the report, that allocation in the river section between Whalen and the Tri-State Dam be

> between Wyoming and Nebraska on the basis of certain proportions of the daily natural flow.

This conclusion is based on the related conclusions expressed at pages 115 and 148–162 of the report to which exception and objection are also taken.

IV. The omission from paragraph 9 of the Special Master's conclusions, at page 10 of the report, of a definition of the term "storage water."

V. Conclusion number 11 (erroneously numbered 10) on page 11 of the report wherein the Special Master concludes that,

> The position of the United States (or the Secretary of the Interior as representative of the United States) is that of an ap-

propriator of water for storage under the laws of Wyoming. Its interests in that connection are represented by the state of Wyoming. No separate allocation to it would be proper in any scheme of apportionment. Unquestioned however is its ownership and authority in the operation of the storage and power plants, works, and facilities pertaining to its Reclamation Projects. What interest it may have in any unappropriated water is an academic question not involved in a decision of the suit.

In this exception the United States also includes the similar conclusions reached and stated in the general discussion of this subject at pages 165–177 of the report.

VI. The omission from paragraphs 1 and 2 of the Special Master's Recommendations for Decree, on page 177 of his report, of any provision requiring Wyoming and Colorado to maintain complete, accurate and available records of irrigation and storage of water in the areas involved.

VII. The omission from paragraph 2 of the recommendations, at page 177 of the report, of any limitation on future storage of water on tributaries entering the river between Pathfinder Reservoir and Whalen.

VIII. That portion of paragraph 2 of the recommendations, on page 177 of the report, which limits storage in reservoirs "above Pathfinder Reservoir" to 18,000 acre feet of water per water

year, unless there be added an exemption from that limitation in favor of the Seminoe Reservoir.

IX. The omission from recommendation 3 (a), at pages 177–178 of the report, of provision that, for purposes of the operation of the reservoirs and the Kendrick Project, Nebraska's equitable share of natural flow water is limited to that which is in fact being diverted by any or all the canals listed in paragraph 3 (b) within the limitations in second-feet and acre-feet there fixed.

X. The recognition of Wyoming as the party responsible for the storing of water in and operation of Pathfinder, Guernsey, Seminoe and Alcova reservoirs and for diversions for the Kendrick Project in recommendations 3 and 4 at pages 177 and 178 of the report.

XI. The omission from recommendation number 4, at page 178 of the report, of a provision permitting joint operation of the government reservoirs, without reference to priorities among themselves or among the lands which they serve, in the event of adjustment of the storage contracts in such a manner as to remove the objection to joint operation which arises from those contracts as they now stand.

XII. Paragraph 5 of the recommendations, on pages 178–179 of the report, in which the Special Master recommends a provision,

> Restraining Wyoming from the recapture of return flow water of the Kendrick

Project after it shall have reached the North Platte River and become commingled with the general flow thereof and from diverting water from the River at or above Alcova Reservoir as in lieu of Kendrick return flow water reaching the river below Alcova.

XIII. The apportionment of natural flow water in the Whalen to Tri-State Dam section as set out in recommendation 6, on page 179 of the report, in that it fails to make any apportionment to the United States and specifically recognizes the deliveries to lands under the Interstate and Ft. Laramie canals as being subject to control by Nebraska.

XIV. The adoption of a percentage of flow basis for apportionment of natural flow water in the Whalen to Tri-State Dam section as incorporated in recommendation 6, on page 179 of the report, and to the omission of recommendation for apportionment in that section in accordance with a priority schedule.

XV. The omission in the recommendations for a decree, at pages 177–180 of the report, of a definition of the term "storage water".

XVI. The omission in the recommendations for a decree, at pages 177–180 of the report, of a specific provision that the distribution of storage water is outside the issues of this case and that, in all respects, the limitations and apportionments

of the proposed decree relate only to natural flow water.

XVII. The omission from the recommendations for a decree, at pages 177–180 of the report, of a provision that the United States is the owner of the water stored in its reservoirs.

XVIII. The omission in the recommendations for a decree, at pages 177–180 of the report, of a provision excluding from the operation of the decree any water, and the return flows from such water, which in the future may be imported into the North Platte or Platte River basins from foreign water-sheds.

XIX. The omission in the recommendations for decree, at pages 177–180 of the report, of a specific prohibition against the use of storage water by those not entitled thereto by contract.

XX. The conclusions of the Special Master stated in the last paragraph on page 180 of his report that portions of his specific recommendations for a decree might be adopted even though others were rejected by the Court.

XXI. The omission, on page 15 of the report, of a conclusion that in Wyoming the statutory limitation of 1 second foot of flow for each 70 acres of land irrigated is not applicable as a limitation on storage water.

XXII. Table III, on page 67 of the report.

XXIII. The Special Master's finding, on page 80 of his report, that the percentages shown in

column 2 of the table on page 81 "are probably the truest index of the adequacy of the supply."

XXIV. The conclusion that the Northport Canal is entitled only to 65 second feet of natural flow water, as shown in the table appearing on page 87 of the report.

SUMMARY OF ARGUMENT

I

United States' exceptions Nos. I, V, X, XIII and XVII deal with the conclusion and recommendations of the Special Master whereby he recognizes the states as representing the rights or claims to water for Federal reclamation projects, their reservoirs and the lands served by them, whereby he apportions, and concedes control over those waters to the States rather than the United States and whereby he concludes that the United States' claim of ownership of unappropriated, non-navigable water is academic. Those conclusions constitute a rejection of both causes of action set forth in the United States' Petition of Intervention.

The first cause of action of the United States is that it originally acquired and held all rights in the lands and water of the North Platte basin, that it has never lost those rights except as it has piecemeal granted specified rights in specified land and water, that the non-navigable, unappropriated water at any given point of time was or

is still the property of the United States, that the United States reserved or withdrew from further private acquisition the water needed and designated by it for project purposes and that it remains the proprietor of that water, being entitled to a decree so declaring and apportioning that water to it. The basic theory of the second cause of action is that, even if the United States did and does not own the proprietary rights in non-navigable, unappropriated water it acquired the rights of proprietorship in project water by appropriation and is still entitled, then, to a decree and apportionment in its own name. The claim of ownership of unappropriated water is pertinent only to the first cause of action and is the foundation for the claim there asserted.

The argument in support of the first cause of action is, in effect, a title examination in large part. The United States did acquire the original ownership of all rights in water in the non-navigable North Platte River and they could be disposed of by the United States or acquired by others only pursuant to action by Congress. The first pertinent act of Congress is that of July 26, 1866, c. 262, 14 Stat. 251. Neither it nor the implementing acts of July 9, 1870, c. 235, 16 Stat. 217, and March 3, 1877, c. 107, sec. 1, 19 Stat. 377, constituted any general grant or divestment of the rights of the United States. They did, however, recognize and grant the right of persons to ac-

quire water rights from the United States through the medium of appropriation in accordance with the forms prescribed by local (or state) law and custom, and also served to separate the land held by the United States from the water so that each could be disposed of separately and the water would not pass, or be held to have passed, under the rule of riparian rights. These statutes did not disturb the rights of the United States in water not appropriated thereunder any more than the homestead or mineral laws affected the rights of the United States in lands or minerals not disposed of under them.

The mere admission of a state to the Union invests it with proprietorship of navigable water, but not of non-navigable water which remains within the ownership and control of the United States. Nor is the continued ownership or control of non-navigable, unappropriated water by the United States affected in any way by territorial or state legislation or state constitutional provisions declaring water to be the property of the state or of the public and proclaiming state control over its disposition or use. These conclusions in no way raise any proper question of equality among the states, it being mere historical happenstance that the United States owns and therefore controls non-navigable water in the western states, whereas it does not in the eastern states.

The Reclamation Act does not itself relinquish ownership of non-navigable, unappropriated

water, nor does it relinquish control over such water to the states. On the contrary, the Reclamation Act and supplemental legislation themselves control in large measure the use of such water when taken or reserved for project purposes and uses. In connection with the North Platte and Kendrick projects, unappropriated water was validly reserved by action of the Secretary of the Interior and the right of ownership and control over that reserved water was maintained in the United States unaffected by the method of adjudication of rights for the projects in conformity with state law and unaffected by the contracts between the United States and project water users. Those contracts, however, create certain rights in the project water users as against the United States, but the nature of those rights is not in issue here nor does their existence affect the basic ownership and control of project water by the United States for purposes of this litigation.

The conclusion, then, for the first cause of action is that the United States is entitled to a decree recognizing its ownership and control of nonnavigable, unappropriated water and project water and to an apportionment to it of the water found by the Court to be apportionable for project use, a conclusion not affected by any incidents of the nature of rights in water and a conclusion not complicating the decree to be entered or em-

barrassing the proper functions of the states in connection with the water allocable to them.

The United States' second cause of action leads to the same results as the first cause of action, but is pertinent only if it be found that the United States does not own unappropriated water and therefore is in the position of an appropriator under state law for its projects. Congress contemplated Federal ownership and control of project water and the states, party to this litigation, have recognized that ownership and control by specific legislation enabling the United States to carry out reclamation projects in accordance with the Federal statutes. Even if that were not so the United States would still be the owner of project water rights by appropriation since it, as an appropriator, is in no more inferior position than a private canal company or an irrigation district which provides water for the use of land owners and state law recognizes such organizations as having proprietorship over the water rights. With the Federal proprietorship in such instances goes control by Congress pursuant to the Federal Constitution.

Certain of the Special Master's conclusions regarding storage water appear to be inconsistent with his denial of apportionment to the United States and certain of the basic principles of his recommended apportionment cannot be made effective without apportionment to the United States.

II

The United States' exceptions Nos. II and VII deal with the Special Master's conclusions and recommendations that no limitation be placed on future storage of water on tributary streams of the Pathfinder to Guernsey section of the river.

The United States submits that the facts show danger of interference with the water supply of the Whalen to Tri-State Dam section by future storage operations on these tributaries and justify or require, for the protection of that supply, a prohibition against future construction of additional reservoir capacity, leaving no limitation on the use of present reservoir capacity. It is further submitted that the failure to fix such a limitation is inconsistent with the imposition of limitations on future storage uses on the Kendrick Project and all areas above Pathfinder Reservoir.

III

The United States' exceptions III and XIV concern the conclusions and recommendations of the Special Master that allocation of natural flow in the Whalen to Tri-State section be on the basis of 25 percent to Wyoming and 75 percent to Nebraska, omitting the United States and also rejecting the United States' proposal that apportionment here be on the basis of a priority schedule.

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The right of the United States to share in this apportionment is established in Part I. On the Special Master's flat percentage method the distribution in this Whalen to Tri-State section, figured on a water requirement basis, should be: United States, 66 percent; Nebraska, 25 percent; Wyoming, 9 percent. That, however, is not equitable, since the United States is of most junior priority. Instead, flows up to 1526 second feet should be divided 75 percent to Nebraska and 25 percent to Wyoming, with flows *above* that amount to be divided 1 percent to Nebraska, 2 percent to Wyoming and 97 percent to the United States.

Most equitable, however, would be distribution, in this short river section, on the basis of a priority schedule instead of percentages. The facts which cause a priority schedule to be inequitable as applied to the entire river are not applicable to this short river section. Furthermore, there is no legal objection to use of such a schedule. The rights of individual appropriators are not fixed without due process of law despite their absence as parties since the states represent them as *parens patriae* and on the authority of *Hinderlider* v. *La Plata River, etc. Co.*, 304 U. S. 92.

IV.

The United States' exceptions IV and XV deal with the omission from the Special Master's recommendations of a definition of storage water.

The report defines natural flow water in terms of distinction from storage water. The proposed decree, limited as it is to natural flow water so defined, cannot operate effectively without a definition of storage water.

There is no fixed definition of storage water, the definition to be used necessarily being dependent on the nature of the equities to be weighed and protected in the decree. To protect those having contract rights to storage water in the Whalen to Tri-State section the definition to be incorporated here should be:

> Storage water is any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet the natural flow requirements of any canal as recognized or prescribed in this decree.

Such a definition in no way conflicts with state statutes regarding storage water or any equitable rights of the parties to this litigation.

V

The United States' exception VI concerns the omission from the Special Master's recommendations of a requirement that Colorado and Wyoming keep complete, accurate and available records of acreage irrigated and water stored in the areas above Pathfinder.

There are no such continuous records now kept for these areas and, without them, it will be im-

possible for those States to know whether or not they are operating within the limitations on acreage and storage recommended for inclusion in the decree. Neither can other parties, or the Court, determine whether violation exists since a survey of the area would be very expensive and consume more time than is available in any irrigation season. If proper records are kept, however, spot checks can easily be made.

VI

The United States' exception VIII goes to the failure of the Special Master to eliminate Seminoe Reservoir from the recommended limitation to 18,000 acre feet a year of storage in all reservoirs in Wyoming above Pathfinder.

Seminoe Reservoir is above Pathfinder and has a capacity of over 1,000,000 acre feet. The Special Master's report and recommendations deal specifically with it and it is clear that its inclusion in the 18,000 acre foot limitation is inadvertent or unintended.

VII

The United States' exception IX seeks to prevent the use of natural flow water originating above the Tri-State Dam on lands served by diversions below that dam in such a way as to affect the equitableness of the apportionment. To fit the mechanics of the proposed decree the exception requests the inclusion in recommendation

3 (a) (report, pp. 177–178) of provision that, for purposes of operation of the Government reservoirs and the Kendrick Project, Nebraska's equitable share of the natural flow water is limited to that which is in fact being diverted and used by any or all of the canals listed in recommendation 3 (b), within the acre-foot and second-foot limitations there fixed.

Without such a limitation Nebraska can, indirectly move the benefit of storage water in part from those who have contracted for it and are paying for it to those who are not entitled thereto. Also in important part, Nebraska could invade the intended water supply of the Kendrick Project, by indirection, in the absence of such a limitation. In each instance the Nebraska benefit would go to water users below the Tri-State Dam whom the Special Master finds to have no equitable claim to any water originating above that point and to have an adequate supply, if properly administered, without that water.

Legally this limitation is proper; equitably it is necessary.

VIII

The United States' exception XI concerns the Special Master's rejection of the suggestion that the decree permit joint operation of the Pathfinder and Seminoe reservoirs when and if the storage water contracts between the United States and water users are so modified as to permit of such operation.

The Special Master concedes advantages to such operation but rejects the suggestion on the basis that the rights of natural flow appropriators might be interfered with. In joint operation, however, priorities would be operative in controlling the storage of water exactly as they are in separate operation, the only effect being on the distribution of the water after it is stored. Thus, only the rights of storage water contractors are affected, and their consent is contemplated by the suggestion; the rights of natural flow appropriators are unaffected.

The recognized benefits of joint operation dictate that the possibility of achieving it should not be foreclosed by this decree.

IX

The United States' exception XII presents two points relating to the treatment of return flow water from the Kendrick Project: (1) that such water, when returned to the North Platte River without a declared and exercised intention on the part of the United States to recapture and reuse it on that project, be merely deemed to be natural flow water within the operation of the decree; and (2) that, to the extent that the United States delivers return flow water from the Kendrick Project to the river by artificial means which water otherwise would never reach the river, the United States should be permitted to divert natural flow

water for the Kendrick Project to which otherwise it would not be entitled.

Point (1) merely removes a discrepancy in treatment, as to use of Kendrick return flow water, between Nebraska and Wyoming users, a discrepancy which necessarily flows from the present form of recommendation number 5 of the Special Master's report.

Point (2) goes to the right of the Kendrick Project to realize the benefit of the artificial drainage built by the United States to carry to the river return flow water which will collect in depressions or "sumps" from which otherwise it will disappear only by evaporation. Since that water will be returned to the river below the point of possible diversion for reuse on the project, the benefit can accrue to Kendrick only by effecting an "exchange" whereby other water, natural flow, is diverted in lieu of the return flow. If the return flow could be directly rediverted for use on the Kendrick Project there would be, as the Special Master recognizes, full legal right so to redivert it. The proposed "exchange" adds no new impediment.

Recognition of this right will deprive no one below of *any* water to which he is equitably entitled or which he would even have physically available to him if the Kendrick Project and its artificial drains were not in operation. The equitable considerations here are basically the same

as those on which the Special Master relies in finding that, because of return flows from the North Platte Project, water users below Tri-State cannot demand natural flow from above that point at the expense of the project which creates that return flow.

X

The United States' exception XVI requests inclusion in the decree of an express provision that it does not affect the distribution of storage water. To leave storage water outside the scope of the decree appears to be the intent of the Special Master's recommendations, but, without specific provision, ambiguity and the possibility of future conflict exist.

XI

The United States' exception XVIII requests specific provision that the decree does not govern the use of water, or the return flow from such water, which in the future may be imported to the North Platte basin from foreign watersheds.

Such future "foreign water" is no part of the water supply here being apportioned, and the equities impelling this decree have no application to such water.

Without a provision excluding such water from the operation of the decree, the decree itself may be a deterrent to future development based on such sources of water supply, a deterrent unneces-

sary and undesirable in view of the over-appropriated character of this stream.

XII

The United States' exception XIX requests inclusion in the decree of a prohibition against the use of storage water by those not entitled thereto by contract. The Special Master contemplates that only those having contracts are entitled to storage water and the inclusion of express provision on the matter will be in aid of orderly and harmonious administration of the water of the stream hereafter.

XIII

The United States' exception XX raises objection to the Special Master's conclusion that the subject matter of some of his recommendations may be omitted from the decree even though the subject matter of others be included.

The decree must be based on the equitable relationships of the entire stream. The recommended decree is so based and each part of it is so interrelated with each other part that the equitable nature of the whole cannot be maintained if any portion is omitted.

XIV

The United States' exception XXI goes to the failure of the Special Master to conclude that the Wyoming statutory limitation on water use to one

second-foot for each seventy acres of land is not applicable to storage water. That it is not so applicable appears from Wyo. Rev. Stats. (1931), secs. 122–117, 122–1508.

XV

The United States' exception XXII goes to the accuracy of the comparison of supply and demand in the Whalen to Tri-State section as it appears in Table III on page 67 of the Special Master's report.

There was *unusable* water in this section during the period covered by the table, when the supply is measured against the demand fixed and used by the Special Master, which is not taken into account in the table.

The table is also misleading in that, in practical operation, some of the excesses shown for individual years, with the reduced requirements used by the Special Master, could and would have been preserved in reservoirs to alleviate the shortages shown for other years.

XVI

The United States' exception XXIII goes to the Special Master's conclusion that the percentages shown in column 2 of Table XV on page 81 of the report are the truest index of the adequacy of the supply for canals in the Whalen to Tri-State section.

As appears from column 1 of that table some canals took excess water at the expense of other

canals in the section. The truest index of the adequacy of the supply for the section, then, must include those excesses, which, in column 2, are excluded.

Furthermore, the non-irrigation season uses reflected in columns 3 and 4 require some consideration since non-seasonal water also contributes to crop growth.

XVII

The United States' exception XXIV objects to the use of 65 second-feet as the flow requirement to meet the needs of the Northport Canal in Table XVII on pages 86–87 of the Special Master's report.

That second-foot requirement is based on the assumption that the majority of the Northport acreage will receive a steady supply throughout the season from return flow water, thereby reducing the requirement for diversion from the river from 186 second-feet to 65 second-feet. Actually, the return flow water available to Northport varies from an average, over a period of years, of 23 second-feet at the start of each irrigation season to 200 second-feet at the end of the season. Consequently, Northport's requirement must be recognized as the full 186 second-feet, to be reduced by whatever return flow is in fact available to it at any point of time.

ARGUMENT

I

(Exceptions I, V, X, XIII and XVII)

THE UNITED STATES IS ENTITLED TO RECOGNITION OF ITS PROPERTY RIGHTS IN, AND ITS RIGHTS OF CONTROL OVER, THE WATER OF ITS RECLAMATION PROJECTS ON THE NORTH PLATTE RIVER, AS WELL AS THE UNAPPROPRIATED WATER OF THE RIVER, AND TO AN APPORTIONMENT TO IT OF THE PROJECT WATER

A. *Statement of the Case Relating to These Exceptions*

All of these exceptions deal with the conclusions and recommendations of the Special Master whereby he recognizes the States of Nebraska and Wyoming as representing the rights or claims to water for Federal reclamation projects, their reservoirs and the lands served by them, whereby he apportions, and concedes control over, that water to those States rather than to the United States and whereby he concludes that the United States' claim of ownership of unappropriated water in this non-navigable stream is academic.

These conclusions and recommendations of the Special Master appear to constitute a rejection of both causes of action asserted in the United States' Petition of Intervention. The recognition, at pages 11 and 141 of the report, however, that the United States is an appropriator of water for storage may be a partial acceptance of the second cause of action, but without acceptance of the basic concept that the United States is entitled to

a decree declaring it to be the owner of the water rights involved or the correlative concept that the United States is entitled to an apportionment of water in satisfaction of those rights.

The theory of the United States' first cause of action, stated summarily, is that the United States acquired both sovereign and proprietary rights in the land and water of the North Platte basin when it acquired that territory from foreign powers, that it has never disposed of or lost those proprietary rights in land or non-navigable water except as it has piecemeal granted specified rights in specified land or water, that the non-navigable, unappropriated water at any given point of time was or is, therefore, the property of the United States, that the United States reserved or withdrew from private acquisition the water needed and designated by it for project purposes and that it remains the proprietor of that water, being entitled to a decree so declaring and apportioning that water to it. The basic theory of the second cause of action is that, even if the United States did or does not own the proprietary rights in unappropriated, non-navigable water, it is still entitled to a decree and apportionment in its own name, because it acquired the rights of proprietorship in project water by appropriation and, under the Constitution control over property of the United States can be exercised only by authority of the Congress.

In view of the nature of these claims of the United States it becomes necessary at the outset that the specific claim to unappropriated, nonnavigable water be put in proper perspective. In conclusion number 11 (erroneously numbered 10 in the report) on page 11, the Special Master concludes that, "What interest it [the United States] may have in any unappropriated water is an academic question not involved in a decision of the suit." This conclusion is based on the discussion at pages 165–177 of the report, particularly pages 175 and 176, where, after reference to the original proprietary rights of the United States, it is stated that, "There has been no subsequent general grant or divestment of the rights of the United States in the unappropriated water by or under any congressional act, and it would seem that such rights must continue to exist. Just what the nature and incidents of such rights may be in the light of intervening facts is an interesting question, but one of little practical importance in this suit." Thereafter the Special Master points out that, so long as Federal law remains what it is, the water of the public domain remains open to private appropriation under state laws and, on page 176, he repeats the conclusion that, "Whether the United States is, strictly speaking, the owner of a right to use the unappropriated water of the river is an academic question as far as the issues are concerned," calling

attention, by footnote, to the additional fact that the natural flow of the river is over-appropriated or substantially so.

Of the facts and conclusions just referred to, the United States concedes all to be correct except the ultimate conclusion that the nature of the rights of the United States is of little practical importance here and the related conclusion that the question of the rights of the United States in unappropriated water is here an academic question.

The United States' first cause of action, as incorporated in its Petition of Intervention, directly places in issue the right of the United States to be decreed to be the owner of the water reserved, as there alleged, for its North Platte Project and Kendrick Project, both being Federal reclamation projects on the North Platte River. With the Government's right to be decreed to be the owner of that water goes its right to an apportionment to it, in this suit, of that water. But the United States' claim under its first cause of action can be upheld only if it owned the *then* unappropriated water at the time of reserving or withdrawing the water needed for its projects at their inception. Consequently the United States takes issue with the Special Master's conclusions that the ownership of unappropriated water is of little practical importance or is academic, and takes the position that its first cause of action cannot be dis-

posed of without resolving that issue irrespective of the existence or non-existence *now* of unappropriated water and irrespective also of the fact that whatever unappropriated water now exists can be appropriated by private parties, by permission of congressional statutes, through the procedures prescribed by state laws. Furthermore, it is the position of the United States that no apportionment of any kind can be made of the water of the North Platte River, as recommended by the Special Master or otherwise, without resolving or disposing of the United States' first cause of action.[2]

The facts pertinent to consideration of the United States' two causes of action are the same, the difference between those causes of action being only in the legal principles applicable to the facts.

At pages 30–36 of his report the Special Master finds and states the primary facts regarding the initiation, construction and operation of the two Federal reclamation projects, including the following:

The North Platte Project was one of the early projects undertaken pursuant to the Reclamation

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[2] The United States' second cause of action, being based on the theory that the Government acquired project water rights by appropriation from the States or the public, presents an inconsistent theory which cannot be adopted as a basis for apportionment of water to the United States without first rejecting the ownership-of-unappropriated-water theory of the first cause of action.

Act (Act of June 17, 1902, c. 1093, 32 Stat. 388), actual construction beginning in February of 1905. The project was designed to serve 237,000 acres of land, not previously irrigated, lying in eastern Wyoming and western Nebraska for the irrigation of which three large main canals were constructed and still operate. The Interstate and the Ft. Laramie canals divert at Whalen, 42 miles above the Nebraska state line, and serve large acreages in both States, the Interstate lying on the north side of the river and the Ft. Laramie lying on the south side. The third canal, the Northport, irrigates lands in Nebraska only and, physically, constitutes an extension of the privately owned Tri-State Canal, which carries the Northport water to the point of commencement of that latter canal. To supplement natural flow available for the project, reservoirs were constructed, the primary one being Pathfinder Reservoir with a capacity of 1,045,000 acre feet, located 210 miles upstream from Whalen. Also, there is an auxiliary channel reservoir, the Guernsey Reservoir, located immediately above Whalen with a present capacity of 50,870 acre feet used both for storage and regulation. On the Interstate Canal are inland reservoirs, Lake Minatare with a capacity of 67,000 acre feet and Lake Alice with a capacity of 11,400 acre feet. The project also includes two hydroelectric power plants, one located at Lingle, Wyoming, and the other at

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Guernsey Dam. Also, there is an extensive drainage system.

"The magnitude of the project is apparent from the facts that its canals and laterals are estimated to have a total length of over 1,600 miles, that the acreage which it was designed to irrigate was the approximate equivalent of half of the then irrigated acreage of the entire North Platte basin, that the storage capacity of Pathfinder Reservoir alone is 79 percent of the average annual run-off of the river at that point and that the cost of the project was $19,000,000.

As contemplated by the Reclamation Act the United States, by contracts first with individual water users and later by contracts with irrigation districts which took over the individual obligations, undertook to recoup the cost of the project and of its operation and maintenance from the land owners served.'

The operation of the project has greatly increased the water resources of the river available for irrigation by the impounding in the reservoirs of large quantities of flood flows and out-of-season flows, which formerly ran off unused, and the re-

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'The total unpaid balance of construction costs due the United States, as of September 20, 1939, was $17,065,317.18, of which $300,928.30 was owed by Warren Act contractors. U. S. Ex. 72, Tr. 20128–20131. As pointed out at p. 20131 of the Transcript, the Farmers' Irrigation District is erroneously not designated as a Warren Act contractor on U. S. Ex. 72.

leasing of that water in the critical middle and late summer periods when natural flow is short and also by holding over that water from years of good run-off to subsequent years of poor run-off. The projects have also increased usable water supplies by creating return flows available for re-diversion and irrigation use, creating a "windfall" to irrigators in Nebraska to the extent of approximately 700,000 acre-feet annually of *visible* return flows and, even during the years 1931–1936 of the drouth period, an average of about 350,000 acre-feet of net return flows available during each *irrigation season.* The existence of the project serving lands in both States and with its primary storage facilities in only one of those States, Wyoming, also presents difficult problems of administration in terms of control exercised by two States. [Here the assumption is indulged by the Master that the United States has no control over the project.] "There is the anomaly of an interstate project without interstate administration."

The Kendrick Project is the second large Federal reclamation project and is located entirely in Wyoming for the purpose of irrigating 66,000 acres of land near Casper. The first unit, capable of serving 35,000 acres, was completed in 1940 but has not yet been put in operation because of lack of water supply. The second unit is under construction. Storage facilities consist of two

channel reservoirs, the Seminoe with a capacity of 1,026,400 acre feet, to which is attached a large hydroelectric power plant and the Alcova with a capacity of 190,500 acre-feet.

The total cost of the Kendrick Project is estimated at $19,350,000 which will be liquidated out of power revenues and payments by land owners benefited by the irrigation water made available and delivered by the project. No repayment has, of course, yet been made by water users on the Kendrick project.

The combined storage capacity of the channel reservoirs of the Kendrick and North Platte projects is 2,313,270 acre-feet or 175% of the long-time average annual run-off at Pathfinder.

So much for the physical characteristics, costs and effects of the projects, all as taken from the Special Master's report. There remain, however, the facts regarding the water supply of the projects including those pertinent to its ownership and control.

By cessions from France, Spain and Mexico in 1803, 1819 and 1848, and by agreement with Texas in 1850, the United States became sovereign over and proprietor of the land and rights in water of the North Platte basin, there being no private rights either in land or water within that basin at that time. Report, p. 165. Thereafter territorial governments and, ultimately, states were created, Nebraska being admitted to the Union

on March 1, 1867 (14 Stat. 391), Colorado on August 1, 1876 (19 Stat. 665), and Wyoming on July 10, 1890 (26 Stat. 222). As is known to the Court, during the territorial periods and since admission of those States, Congress has, in exercise of its functions under Article IV, Section 3, clause 2, of the Constitution, made or by general legislation provided for various reservations, on the one hand, and grants, on the other hand, of the property of the United States within those territories or states—including property in lands, minerals and water. Thus various private rights in this non-navigable water, the very rights lying behind the States' equities in this litigation, have been created over the years one by one through the means of appropriation in accordance with custom and territorial law or, more recently, state law, as specifically permitted and provided by Congress in the Act of July 26, 1866, c. 262, 14 Stat. 251, which is implemented by the Act of July 9, 1870, c. 235, 16 Stat. 217, and the Desert Land Law of March 3, 1877, c. 107, 19 Stat. 377.* The validity of those private rights and the authority of the States to control their exercise since their acquisition, the United States does not dispute, nor does it dispute the fact that unappropriated water in the stream over and above the amounts reserved or appropriated for

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* The provisions and effect of these statutes are developed in the argument which follows.

the Government projects remains subject to private acquisition, by appropriation under the statutes cited.

For the purposes of the North Platte Project and pursuant to the authority contained in Section 3 of the Reclamation Act (Ac. of June 17, 1902, c. 1093, 32 Stat. 388), the Secretary of the Interior withdrew from public entry certain public lands in Nebraska and Wyoming which were required for the irrigation works of the project and for the purposes of the Reclamation Act. The more important of these withdrawals bear date and appear in the record of this case as follows: Pathfinder Reservoir, August, 1902 and January 27, 1904, U. S. Ex. 7a, pp. 3–4, 16–18; Guernsey Reservoir, November 21, 1904, U. S. Ex. 7a, pp. 55, 56; Lake Minatare Reservoir, September 20, 1904, U. S. Ex. 7a, pp. 47, 48; Lake Alice Reservoir, September 20, 1904, U. S. Ex. 7a, pp. 47, 48; and the Whalen Diversion Dam, August 1, 1905, U. S. Ex. 7a, pp. 61, 62 (U. S. Ex. 7a was offered in evidence at pages 20048–20051 of the Transcript). By the same authority the Secretary also withdrew from public entry, except under the homestead laws, and subject to the terms, conditions and limitations of the Reclamation Act, all public lands in the North Platte basin in Nebraska and Wyoming which were believed to be susceptible of irrigation from the project. In Nebraska, the basic withdrawal of this type was

made on February 11, 1903, and was supplemented on May 3, 1904, June 13, 1904, June 21, 1904, and June 27, 1904. U. S. Ex. 7a, pp. 9, 10, 30–33, 39–40, 41–43 and 44–46; Tr. 20048–20051. In Wyoming the basic withdrawal was also made on February 11, 1903. See certified copy appearing as Appendix I of this brief.* Of the various public lands withdrawn, the Secretary subsequently restored to entry, under the public land laws, all of those which were not required for the irrigation works of the project or which were ultimately found not to be susceptible of irrigation by the project. The lands on which the withdrawals were *not* revoked, or the lands not restored to public entry, as of December 31, 1939, are as shown for the area at and below Guernsey Reservoir, and at and surrounding Pathfinder Reservoir on the map which is the first page of U. S. Ex. 8, Tr. 20051–20052, 20157–20163. As of the time of initiation of the project approximately 148,000 acres of the land susceptible of irrigation by the project, and included in the withdrawals, were public land, Tr. 20433–20435.

Under similar authority the Secretary of the Interior has also withdrawn the public lands needed for the works of the Kendrick Project and

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*This withdrawal order was omitted from U. S. Ex. 7a. The court is asked to take judicial notice of it, as also was the Special Master when the case was presented to him. The certified copy has been deposited with the Clerk and is merely reproduced as Appendix I hereof.

the lands susceptible of irrigation from that project, the lands of the Seminoe Reservoir having been withdrawn on October 2, 1929, and January 20, 1932 (U. S. Ex. 7b, pp. 456, 466–467).[1] The basic withdrawal of public lands susceptible of irrigation was on October 6, 1933 (U. S. Ex. 7b, pp. 471–472). Additional withdrawals were made to and including November 2, 1936 (U. S. Ex. 7b, pp. 473–474, 477, 479, 481, 484).[1] Although the irrigation works of the project as a whole have not been completed, it is estimated that about seven per cent of the irrigable area will be public lands (Wyo. Ex. 1, p. 4, Tr. 15260–15264, 15268).

The initiation of both projects was accompanied by filings made pursuant to the direction contained in Section 8 of the Reclamation Act, *supra*, in the name of the Secretary of the Interior for and on behalf of the United States, with appropriate officials of Wyoming and Nebraska for the diversion, use and storage of water of the North Platte River. All of these filings were accepted by the state officials as adequate under state law and were accorded full recognition by them. The priority dates, thus established in conformity with state law and which fix the dates of the reservations, under the first cause of action, or the appropriations, under the second cause of action, are December

[1] U. S. Ex. 7b is a continuation of U. S. Ex. 7a and was introduced with it. Tr. 20048–20051.

6, 1904, for the natural flow rights of the three canals of the North Platte Project and for the storage rights in the Pathfinder Reservoir of that project.* The Guernsey Reservoir of that same project is recognized with a storage right priority of April 2, 1923. All North Platte Project canals also have recognized rights to divert the storage water of the two reservoirs, those rights having recognized priorities as of the same dates as the respective reservoir storage rights. Special filings also were made and accepted for the use of water for generating power at the project power plants. Report, pp. 57, 136, 172; U. S. Ex. 10, Tr. 20053; U. S. Ex. 11, Tr. 20054; U. S. Ex. 17, Tr. 20057; U. S. Ex. 18, Tr. 20058; U. S. Ex. 19, Tr. 20058; U. S. Ex. 23, Tr. 20061; U. S. Ex. 24, Tr. 20062–20064; U. S. Ex. 25, Tr. 20064; U. S. Ex. 26, Tr. 20064–20065. These filings cover 1625.55 second feet of natural flow for approximately 113,800 acres under the Interstate Canal (report, p. 204), 1530.4 second feet of natural flow for approximately 107,100 acres under the Ft. Laramie Canal (report, p. 196) and 230 second feet of natural flow for approximately 16,100 acres under the Northport Canal (report, p. 232).

Similar filings were made for the Kendrick Project, in conformity with the laws of Wyoming,

*Nebraska, however, recognizes a priority date of September 19, 1904, for these works. U. S. Ex. 35, pp. 1–9, Tr. 20069–20070; Tr. 14944–14945.

the Seminoe Reservoir having a recognized priority date of December 1, 1931, the Alcova Reservoir having a recognized priority date of April 25, 1936, and the Casper Canal having a recognized priority date for natural flow diversions of July 27, 1934, for an irrigable area of 82,263.5 acres. The canal also has separately recognized rights to divert water stored in the two reservoirs, those rights being recognized as carrying the dates of the reservoir priorities. The Seminoe Power Plant also has a separately recognized power right of April 25, 1936. Report, p. 138; Wyo. Ex. 31, Tr. 16739–16740; Wyo. Ex. 33, Tr. 16746; Wyo. Ex. 34, Tr. 16746; Wyo. Ex. 35, Tr. 16747; U. S. Ex. 31, Tr. 20066–20067; U. S. Ex. 32, Tr. 20067; U. S. Ex. 33, Tr. 20067–20068. Although possessed of a natural flow right, because of its juniority the Kendrick Project is essentially a storage project. Report, pp. 141, 143.

On the North Platte Project the individual water users on the first unit to be put into operation, the Interstate Canal unit, originally became entitled to the use of project water pursuant to contractual provisions embodied in accepted or approved "water right applications", the various forms of those applications being exemplified by United States Exhibits 44 to 49, inclusive (Tr. 20103–20106). On the later units of the project, the Ft. Laramie and the Northport, the water users originally became entitled to use project

water on a temporary rental basis only, thereafter securing fixed contract rights for water in contracts between the United States, on the one hand, and irrigation districts formed by those water users, on the other hand. Ultimately the water-right application contracts with individual water users on the Interstate unit were also, in effect, merged into a contract between the United States and the Pathfinder Irrigation District formed by those water users. These various irrigation district contracts appear in the record as Nebraska Exhibits 567 (Tr. 14958–14959), 570 (Tr. 14980–14981), 574 and 575 (Tr. 15007–15008), and Wyoming Exhibit 11A (Tr. 15848–15850). A similar contract has been entered into with the Casper-Alcova Irrigation District on behalf of the lands and future water users of the Kendrick Project. Wyo. Ex. 3, Tr. 15268.

Before the Special Master it was urged that the provisions of these "repayment contracts" between the United States and the irrigation districts were significant in showing that the United States retains no proprietary interest in project water. In his report the Special Master recognizes that they may be of significance in that connection. Footnote 1, p. 173. The United States agrees that those contracts are significant and contends that they support its claim to proprietary rights in project water, as will be more fully developed in the subsequent argument.

The irrigation districts and their contracts with the United States have also played a part in the final adjudication proceedings, in perfection of the water filings made by the United States in conformity with state law. As pointed out at page 173 of the report, the districts submitted proof of beneficial use on behalf of the project water users in those adjudications, and the Wyoming authorities accepted such proof, issuing decrees and certificates in favor of the individual water users. It is significant, however, that whatever the powers of the state authorities in that regard, they safeguarded the rights which the United States had in that project water by reciting that the applicants for adjudication had, by contract with the United States, acquired an undefined right in the original permits adequate to found the adjudications (third paragraph, Nebr. Ex. 571, Tr. 14982–14983, and Wyo. Ex. 7, Tr. 15363–15365; fourth paragraph, Nebr. Ex. 576, Tr. 15009–15013), and by issuing the actual certificates of adjudication expressly subject to the terms of the contracts with the United States (Nebr. Exs. 572, Tr. 14982–14983; 577, Tr. 15009–15013; Wyo. Ex. 8, Tr. 15363–15365).

Contractual rights in North Platte Project water also have been granted by the United States under the provisions of the Warren Act (Act of February 21, 1911, c. 141, 36 Stat. 925) to non-project water users. That statute authorizes the

Secretary of the Interior to contract for the storage and delivery of surplus water conserved by a reclamation project over and above the requirements of the project proper. Report, p. 34. Nine such contracts were executed in connection with the North Platte Project, contemplating a total amount of water of 307,000 acre feet per season (report, p. 35), which is to be made up from the natural flow to which the contractors are entitled, plus the return flows available to them, implemented by whatever amounts of storage water are necessary to fulfill the stated maximum obligations of the contracts (report, pp. 189–190). These contracts are identified in the report at pages 35 and 189 (footnotes), the amounts of water designated in each of them appears at page 190 of the report as does the proper requirement found by the Special Master for each of them, and the pertinent provisions of the contracts are set out at pages 183–184 and 190–192 of the report. The result of these contracts, all of them for canals having even or older priority dates than the project canals (compare priority dates shown in Table XVII, pp. 86–87 of the report), is that 90 per cent of the lands served by diversions in the Whalen to Tri-State Dam section have contract rights in project storage water and are dependent on such water, that of those lands having such rights 32 per cent have Warren Act contracts only and 68 per cent are project lands. Report,

p. 75. The importance of this dependence on project storage water is apparent from the fact that natural flow is far insufficient for the needs of this river section (report, p. 72) and that, long before the recent drouth period, even the older priorities had a demonstrated need for storage water to supplement their direct flow rights because the river normally failed to supply those rights from and after mid-summer, in each year, when river flows always recede (Tr. 20456, 21252).

From these data the magnitude of the Federal interests, under the Reclamation program, on the North Platte River is apparent as is also the extensiveness of the dependence of water users both in Nebraska and Wyoming on the supply of water in and through the Government's reclamation facilities in Wyoming alone.

The importance of the Federal interest in reclamation throughout the West and of dependence on that Federal program throughout the West is common knowledge in these days when small projects are already constructed and when only large and expensive projects involving tremendous reservoirs and extensive distribution systems remain to be undertaken because of the general exhaustion through present overappropriation of dependable direct flow water in the available streams. A few statistics on that score, however, may be appropriate. According to United States Bureau of the Census data there were fully irri-

gated, under works of the Bureau of Reclamation, 1,485,028 acres in 1929, and 1,824,004 acres in 1939. U. S. Ex. 207B, Tr. 28072–28073. In addition, Bureau of Reclamation works furnished a supplemental supply to 1,234,230 acres in 1929 and 1,460,470 acres in 1939. U. S. Ex. 207C, Tr. 28074–28075. Office of Indian Affairs irrigation projects furnished a full supply to an additional 331,840 acres in 1929 and 506,646 acres in 1939. U. S. Ex. 207B, Tr. 28072–28073. The total of lands furnished a full supply by non-Federal projects in 1939 was 16,777,833 acres. U. S. Ex. 208, Tr. 28075–28076. The total of lands to be furnished either a full or a partial supply by Federal projects alone on completion of the current program of development is estimated to be 13,515,751. U. S. Exs. 227, 229, Tr. 28177–28182.

Obviously the United States' interest is great—on the North Platte River and throughout the West. Equally obviously the interests of a vast number of irrigators are dependent on the proper maintenance and exercise of the rights and duties of the United States in its reclamation program. Likewise, the interest in power development on Federal reclamation projects is tremendous, there being on such projects in 1941 a total installed capacity of 1,144,462 kilowatts and a total capacity installed, under construction or definitely authorized of 4,633,162 kilowatts, 25 to 30 per cent of present total hydroelectric installations in the

entire United States. U. S. Ex. 233, Tr. 28200-28202.

B. *The United States' First Cause of Action Requires Recognition of Rights of the United States in Project Water and Unappropriated Water, and Apportionment of the Project Water to the United States*

1. The United States originally acquired ownership of all of the lands and water of the North Platte Basin and now retains that ownership, with attendant control over the disposition and use of those lands and water, except as to specific lands or rights in lands granted away and specific water which the United States has permitted to be appropriated

As stated at page 165 of the Special Master's report, at the time of acquisition of the territory embraced in the North Platte Basin "the United States became the owner of such rights in the waters as were subject to ownership", there having been no private ownership of either land or water in the area at that time.[9] Obviously, then,

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[9] The phrase "ownership of water" and similar expressions of like meaning are used elsewhere in this brief, as they are in the Special Master's report, as a convenient method of designating the ownership of those rights to use water which are the subject of ownership. The rights in water which the sovereign may be capable of "owning" may be greater than those which an individual is capable of "owning", but that fact is not significant to the theory of the Government's claims here. It should be noted in that connection that in any event, rights in water or its use are real property rights and that that is so under either the doctrine of appropriation or that of riparian rights. *Travelers Insurance Co.* v. *Childs*,

the United States still owns those rights in water, just as it still owns public domain lands, to whatever extent it has not granted them away or otherwise disposed of them.[10] The basic problem is one of title examination to determine what grants or disposals have been made and their effect. If none has been made which affects the ownership of unappropriated water, the basic concept of the United States' first cause of action is established and there remains only the problem of determining whether the incidents of the Reclamation Law and the creation of the North Platte and Kendrick reclamation projects, including the

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25 Colo. 360, 363 (1898); *Davis* v. *Randall*, 44 Colo. 488, 492 (1908); *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 165, 166 (1816); 2 Kinney, Irrigation and Water Rights (2d Ed.), pp. 1328–1332; 1 Wiel, Water Rights (3d Ed.), pp. 298–301; Washburn on Easements (4th Ed.), pp. 316, 317; Restatement of Torts, Sec. 849.

Heretofore the other parties in this litigation have urged that the nature of the rights acquired or held by the United States are not such as to justify recognition in this case or apportionment of water to the United States. That contention can more conveniently be treated separately and is discussed in subsection 3 of this section of the brief, *infra*.

[10] It is clear that title or property rights cannot be acquired in property of the United States except pursuant to Congressional legislation. *United States* v. *Oregon*, 295 U. S. 1; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Gibson* v. *Chouteau*, 13 Wall. 92; *Jourdan* v. *Barrett*, 4 How. 169. Cf. *Campbell* v. *Wade*, 132 U. S. 34. Application of that principle to non-navigable water on the public domain was specifically recognized in *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 703.

water filings, proofs of water use and the contracts with the water users or their organizations, are of such a nature as to disturb the ownership by the United States of the project water which was unappropriated water owned by the United States at the time of its taking for project use. The latter problem is for discussion in a subsequent subsection of this brief (subsection 2 of this section).

On page 175 of his report, the Special Master, after recognizing the original title of the United States in the water of this river, concludes that, "There has been no subsequent general grant or divestment of the rights of the United States in the unappropriated water by or under any congressional act, and it would seem that such rights must continue to exist." That conclusion confirms and adopts the basic concept of the United States' first cause of action. Because, however, it is a concept vigorously attacked by the other parties to this suit in former stages of the proceedings, the United States anticipates further attack on it in answer to this brief and here presents succinctly the "examination of title" which compels that conclusion.

Pursuant to its constitutional power over property of the United States (U. S. Const., Art. IV, Sec. 3, cl. 2), Congress has from time to time made both general and specific grants of rights in the public domain. It has granted lands to

states and, under such statutes as the homestead laws, it has provided for grants of small tracts to individuals; it has refused general grants of minerals and mineral lands, but it has provided for grants or leases of small tracts of mineral lands to individuals; and it has legislated in reference to the acquisition from the United States of rights in water. The first statute in which Congress recognized and asserted its power to control the disposition of non-navigable water related to the Northwest Territory. Act of May 18, 1796, c. 29, sec. 9, 1 Stat. 468.

a. The Acts of 1866, 1870 and 1877 did not divest the United States of title to or control over unappropriated water.

The original water legislation applicable to the territory of the Platte River basin was incorporated in the first mining law for the public domain of the West. Act of July 26, 1866, c. 262, 14 Stat. 251. Section 9 of that act dealt with water and provided:

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; * * *.

This act treated minerals and water alike and, as to each, gave sanction to the possessory rights initiated or acquired under local customs, law and court decisions. *Jennison* v. *Kirk*, 98 U. S. 453; *Meng* v. *Coffee*, 67 Nebr. 500, 509–512 (1903). It has been said that the United States had, by its prior conduct, recognized the rights of individuals to the minerals and water of the public domain and had encouraged people to establish such rights under local customs and laws, thereby creating an obligation on the Government to protect those rights, in view of which the 1866 act was "rather a voluntary recognition of preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one." *Broder* v. *Natoma Water and Mining Co.*, 101 U. S. 274; *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142. It is also said, however, that prior to the Act of 1866 the claims of individuals to water were good *except as against the United States*. *Basey* v. *Gallagher*, 20 Wall. 670, 681.

For present purposes the important thing is that the Act of 1866 operated and operates to confirm title, whether to rights in minerals or rights in waters, only in particular persons who had or have initiated their rights in the manner prescribed. It set up and acknowledged a procedure whereby rights in specific and particular minerals and waters could be acquired for indi-

vidual use; it did not constitute or purport to constitute a general grant, divestment or dedication to the public of rights either in minerals or water. It contains no words of general grant, divestment or dedication; its purpose did not require that and its interpretation does not include it. *Cf. Jennison* v. *Kirk, supra; Basey* v. *Gallagher, supra; Atchison* v. *Peterson,* 20 Wall. 507; *Sturr* v. *Beck,* 133 U. S. 541, all of which also concede the basic ownership of the United States.

The Act of 1866 was implemented by the Act of July 9, 1870, c. 235, 16 Stat. 217, which, in section 17, provided:

> * * * all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

This act is, of course, no grant at all; it merely protects and recognizes rights established under the 1866 act.

Next in point of time, and also significance, is the Act of March 3, 1877, c. 107, sec. 1, 19 Stat. 377, commonly known as the Desert Land Law. That act authorizes the entry and reclamation of desert lands within named states and territories (not including Nebraska and including

Colorado only since 1891) and requires a declaration that the entryman intends to reclaim the land by irrigation;

> *Provided, however,* That the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

In the first place it should be noted that this statute assumes to exercise a control over the water of the public domain, a control the authority for which has not been challenged so far as counsel know. Here, then, is further clear and convincing demonstration that the prior Acts of 1866 and 1870 were not grants, divestments or dedications of public domain water generally, but were mere grants or acknowledgments of separate and particular rights of appropriation. It is to be noted further that the Desert Land Law does not itself grant water rights to the individual.

entryman; it leaves that to the then existing law which, of course, stems solely from the Act of 1866.

The only portion of this statute which could possibly be said to constitute any type of a grant, divestment or dedication of rights in water is the provision that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." But there are no words of grant or divestment in that provision; there are no words of dedication to the public or to the states. There is, in language, a mere declaration by Congress of its policy in the disposition of the water unused by desert land entrymen and the non-navigable water of the public domain—a declaration and a policy changeable at any time by the Congress in the exercise of its constitutional power to control the dispostion and use of Government property, although, of course, not changeable in any manner so as to affect the individual rights to particular water then vested. To hold otherwise would require an expansion of the language which is not warranted."[11] Directly in point is the language and

[11] Pertinent, of course, is the well-settled principle that public grants are to be construed strictly and that nothing

conclusion of this Court in *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 706–707, where, after setting out these same statutes, the Court said:

> Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. * * * To hold that Congress, by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what

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passes by implication, a principle which applies even in grants to states or territories for public purposes. *Leavenworth, Lawrence & Galveston R. R. Co.* v. *United States*, 92 U. S. 733; *Rice* v. *Minnesota & N. W. R. R. Co.*, 1 Black 358; *United States* v. *Michigan*, 190 U. S. 379. *Cf. Oklahoma* v. *Barnsdall Refineries, Inc.*, 296 U. S. 521.

under the circumstances of the case must be held to have been the intent of Congress.

The conclusion is that, because of the power of Congress to preserve the navigable character of a watercourse, it cannot be held that Congress, by the acts which are under examination, abandoned its right to control the uses or disposition of water on *non*-navigable streams which are tributary to navigable watercourses.[12] Certainly there was, then, no grant, divestment or dedication of all rights in non-navigable water; there was, instead, merely the provision and acceptance of a procedure whereby specific and particular rights may

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[12] Reference should be made to the fact that, just after the language which has been quoted from *United States* v. *Rio Grande Dam & Irrig. Co.*, the Court adverted to a subsequent statute dealing with obstructions to navigation and then said, "As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes, it must be held controlling, at least, as to any rights attempted to be created since its passage; * * *". Whether the reliance placed by the Court on this later statute operates to make dicta of the language quoted, in the body of the brief, is not clear. We believe it does not and that the Court expresses alternate grounds of decision. Be that as it may, the language relied on has not been repudiated so far as we know. It has been quoted with approval as late as 1931 (*United States* v. *Central Stockholders' Corp.*, 52 F. 2d 322, 324–327 (C. C. A. 9)) and has been cited with approval by this Court as late as 1941 (*Oklahoma* v. *Atkinson*, 313 U. S. 508, 523). Furthermore, that basis of decision which rests on the subsequent enactment of Congress is necessarily predicated on the proposition that the former statutes were not general or irrevocable grants, divestments or dedications of the navigable or non-navigable water of the public domain.

validly be acquired from the United States by compliance with state and local laws or rules. *Cf. Gutierres* v. *Albuquerque Land & Irrig. Co.*, 188 U. S. 545.

This conclusion is directly and inescapably supported, also, by the subsequent decision in *Winters* v. *United States*, 207 U. S. 564. In that case the United States sought to enjoin the diversion of water of the non-navigable Milk River in Montana, contending that that water was required for domestic and irrigation uses on the Fort Belknap Indian Reservation and that that water was, therefore, impliedly reserved for those purposes by the creation of the reservation in 1888. The defendants contended (1) that the water was open to appropriation under the laws of the United States and Montana and that they, the defendants, had valid appropriations under those laws and (2) that, assuming that there had been an implied reservation of the water by the United States, that reservation was repealed by the subsequent admission of Montana into the Union. This Court held for the United States on both issues and, in so doing, said:

> The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 702; *United States* v. *Winans*, 198 U. S. 371 [207 U. S. at 577].

It is significant that the reservation of the non-navigable water, with its consequent denial of that water to the defendants, was made eleven years *after* the passage of the Desert Land Law. Here again it is clear that the Acts of 1866, 1870 and 1877 did not divest the United States of its non-navigable water on the public domain.[13]

The intent and effect of the Desert Land Law is stated in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142. That was a case of conflict between two users of water on a non-navigable Oregon stream. One claimant relied on riparian rights which he contended attached to his land which had been patented by the United States after the Desert Land Law but, so the contention was, before Oregon abandoned the riparian rule. The other claimant relied on prior appropriation of the water. The Court resolved the conflict against the riparian claim and, in doing so, found the intention of Congress in the Desert Land Law "to further the disposition and settlement of the public domain,"[14] an intention based on the realization "that the future growth and well-being of the entire region

[13] The basic principle of the *Winters* case has been applied by the Ninth Circuit Court of Appeals in various factual situations. *United States* v. *McIntire*, 101 F. 2d 650 (C. C. A. 9); *United States* v. *Walker River Irrigation District*, 104 F. 2d 334 (C. C. A. 9); *cf. United States* v. *Alexander*, 131 F. 2d 359 (C. C. A. 9).

[14] 295 U. S. at 161.

depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water."[15] The Court then found the effect of the Desert Land Law as follows (p. 158):

> In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert-land entrymen, but "the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable," were to remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed. While this court thus far has not found it necessary to determine that precise question, its words, so far as they go, tend strongly to support the conclusion which we have suggested.

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[15] 295 U. S. at 157.

The Court rephrased the conclusion, at a later point in the opinion, in this way (p. 162):

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell* v. *Johnson*, 89 F. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.

On the basis of this conclusion the Court held that the power company's alleged riparian right was not good.

In considering this case reference must, however, be made to additional language used by the Court at the conclusion of its opinion (pp. 163–164):

> Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to

> determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," *Kansas* v. *Colorado*, 206 U. S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming* v. *Colorado*, 259 U. S. 419, 465.

That language is, the United States submits, dicta following, as it does, the actual decision of the case. In any event it is clear that that language does not alter or affect the actual decision itself and cannot be interpreted in any manner inconsistent with the decision. At page 152 the Court recognizes that, prior to 1909, it was doubtful whether or not the Oregon law recognized riparian rights, and also states the petitioner's contention that, since its lands were patented in 1885, it secured riparian rights which could not be defeated by the respondent's subsequent appropriation. The Court then said that, "in view of the conclusion to which we have come, it is unnecessary to pursue the inquiry further," referring to the inquiry whether or not Oregon recognized

riparian rights prior to 1909. The ultimate decision, of course, was that the riparian claimant could not prevail because of the Desert Land Law. He could not prevail because that law separated the land and the water so that, with his patent, he got no water. If, however, the Desert Land Law had been a grant of water to the states or had, in a strict sense, made the water "*publici juris*, subject to the plenary control of the designated states" (including Oregon), then the law of Oregon would have had to be determined. The Court could not pass by the inquiry into Oregon law as "unnecessary" in such circumstances, and could not have determined the case against the riparian claimant on the basis of the Desert Land Law, as it did. Those conclusions, it is submitted, are inescapable.

The widest possible scope which can be given to the language of the Court quoted last above, to avoid conflict with the decision rendered, is that the act, having separated the land and the water, does not force the appropriative system on a state whose law clearly rejects that system in favor of the common-law riparian system, that it permits state law to control where it is clear, but that in the absence of clear state law, the separation of the water from the land precludes the acquisition of a riparian right on acquisition from the Government of land. In other words, the natural operation of the Act of 1866 is permitted to continue, implemented in the Desert

Land Law by a more clear separation of the land and water to permit it full and unfettered operation. Where the local (state) law is apparent or clear, as it must be to recognize and acknowledge an appropriative right as contemplated by the 1866 act, appropriative rights may be acquired by conformity with that local law; where the local law clearly rejects appropriative rights, they cannot be acquired, again as necessarily follows from the 1866 act itself; and where the local law is unclear, in which case the 1866 act cannot be applied, the separation of land and water in the Desert Land Law prevents the acquisition of any rights of any kind by mere acquisition of land. The Desert Land Law in effect merely implements the Act of 1866 by specifying that only an appropriative right can be acquired by a patentee of public land in a State where local law is not settled, and, in doing so, it constitutes direct congressional control over the water.

Clearly, then, the decision in the *California Oregon* case does not interpret the Desert Land Law as a grant or irrevocable dedication to the public of non-navigable water.[19] It merely constituted a declaration of policy which is also, of course, a law so long as it remains effective. The basic ownership of the United States is not affected. The right to appropriate water from the United States

[19] Even if it did, it could not be conclusive of the claim of title of the United States which was not a party to the suit. *Arizona* v. *California*, 298 U. S. 558.

pursuant to the Act of 1866, through the instrumentality of state law, is not affected. And the right of Congress to provide further for the reservation, the control or the other disposition of remaining unappropriated water is not affected.[17]

To interpret the *California Oregon* case differently would require disregard of the former decisions of this Court in *Winters* v. *United States* and *United States* v. *Rio Grande Dam & Irrig. Co.*, both *supra*, the latter of which cases was mentioned and *not* overruled in the *California Oregon* opinion. Furthermore, it would require disregard of subsequent acts of Congress purporting to exercise control over non-navigable water or founded on recognition of its power so to do. See, *e. g.*, Act of June 3, 1878, c. 151, 20 Stat. 89 (43 U. S. C. sec. 311), providing that patents to timber and stone lands shall be subject to vested and accrued water rights and ditch or reservoir rights, "as may have been acquired under" the

[17] The declaration of policy (which loosely may be called a dedication) contained in the Desert Land Law cannot foreclose future and divergent action by Congress over unappropriated water since, in the absence of an actual grant of rights, Congress cannot divest itself of its constitutional power over public property. *In re Rahrer*, 140 U. S. 545; *Van Allen* v. *Assessors*, 3 Wall. 573.

It is not inconsistent with that concept, incidentally, that Congress can adopt state law, as it has in this instance, as a medium for the disposition of Government property. *Butte City Water Co.* v. *Baker*, 196 U. S. 119. *Cf. Olson* v. *Matko*, 223 U. S. 649, 655.

Act of 1866, and that such rights be expressly reserved in any patent issued; Act of March 3, 1891, c. 561, sec. 18, 26 Stat. 1101 (43 U. S. C. sec. 946), granting rights of way for canals and ditches and expressly stating that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories"; Act of June 4, 1897, c. 2, 30 Stat. 36 (16 U. S. C. sec. 481), providing that waters on forest reserves may be used under State laws "or under the laws of the United States and the rules and regulations prescribed thereunder"; Act of June 11, 1906, c. 3074, sec. 3, 34 Stat. 234 (16 U. S. C. sec. 508), providing that no entries of land in the Black Hills National Forest in South Dakota, a riparian law state, should carry riparian rights but that waters there should be subject to appropriation; and the Reclamation Act itself, c. 1093, 32 Stat. 388 (43 U. S. C., sec. 371, *et seq.*) particularly section 8 thereof.

It has been urged in former stages of this proceeding that *Brush* v. *Commissioner of Internal Revenue,* 300 U. S. 352, and *Ickes* v. *Fox,* 300 U. S. 82, refute the interpretation of the Desert Land Law given above. In the latter case the Court stated that the Desert Land Law "reserved" the non-navigable water "for the use of the public under the laws of the various arid-land states", citing the *California Oregon* case. In the former case, the Court used the language of dedication of

non-navigable water and plenary state control, again citing the *California Oregon* case. In each instance the language used is merely stated as a conclusion, the entire reliance for the language being on the cited *California Oregon* case. Since that is so, the interpretation of the language used must and does depend entirely on the interpretation of that case, which has already been discussed.

An additional matter regarding these latter cases should be pointed out briefly, however. The *Brush* case had to do with application of the Federal Income Tax Law to the salary of an official of an eastern municipality's water bureau. In *Ickes* v. *Fox* the sole questions, raised by the pleadings alone on a motion to dismiss, were whether the suit was against the United States and whether it sought to compel the United States specifically to perform a contract. In each instance the language used falls squarely within the rule announced in the *Brush* case itself (300 U. S. 373), that where matters discussed in an opinion were not in issue and were not necessary to decision, "Expressions of that kind may be respected, but do not control in a subsequent case when the precise point is raised for decision."[18]

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[18] This concept is also directly applicable to the language of the last quotation, above, from the *California Oregon* case, unless it be interpreted as suggested in this brief.

The actual decision in *Ickes* v. *Fox* (but not in the *Brush* case) has also been said to be pertinent to this case. If there

Consequently, it is submitted that the Acts of 1866, 1870 and 1877 did not constitute any general grant, divestment or dedication of rights in non-navigable water; that they merely operated to separate the water from the land and to provide a means whereby individual rights in designated and limited quantities of water can be acquired from the United States by appropriation in conformity with state or local law; and that the basic title of the United States to such water as has not been appropriated remains undisturbed by these statutes.

In this, the statutes are a direct parallel to the so-called mining laws, which find their origin in the self-same Acts of 1866 and 1870. There is, of course, no question that the United States has retained and owns the minerals of the public domain in which individual and specific rights have not been granted either as incidents to grants of land in the early days or under the mining laws themselves in later days. Yet the Act of 1866 and the subsequent Act of May 10, 1872, c. 152, 17 Stat. 91, treated minerals in the same manner as the 1866 act treated water. *Jennison* v. *Kirk,* 98 U. S. 453; *Butte City Water Co.* v. *Baker,* 196

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be such pertinence, it is in connection with the relationship between the United States and its project water users under the terms of the Reclamation Act; not in connection with this basic concept of Government ownership of unappropriated water. As such it is discussed in subsection 2, *infra.*

U. S. 119.[19] In that latter case the Court found, after reciting provisions of the mining laws and the similar *water provisions* of the Act of 1866, that the state and local laws were there adopted by the Congress in the manner of subsidiary regulations to govern in the disposition of the Government property to individual locators or appropriators, the entire basis of decision being that the Government retained title to the minerals not privately acquired under the statutes and Congress retained its constitutional control of the continued disposition thereof. Nor can that situation regarding minerals be distinguished from the situation regarding non-navigable water on the basis of the "dedication" contained in the Desert Land Law of 1877. That "dedication" finds almost exact counterpart in section 1 of the Act of 1866 where it is provided, "That the mineral lands of the public domain * * * are hereby declared to be free and open to exploration and occupation by all citizens of the United States."[20] But there

[19] Cited with approval in *Clason* v. *Matko*, 223 U. S. 646, 655.

[20] This declaration is subject to qualifications, the only one of present significance being that it is made "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States." Giving that its broadest interpretation, as a declaration of the supremacy of Federal law, it has no more significance than the provisions in the Desert Land Law that rights in water for desert land entries shall

is still no question that the United States owns the minerals not taken up ("appropriated", in the language of water law) by individuals under the mining laws and retains the right to control their disposition. So it is, also, with unappropriated, non-navigable water so far, at least, as the Acts of 1866, 1870 and 1877 are concerned.

b. The mere admission to the Union of new States, including Nebraska, Wyoming and Colorado, did not effect a grant or transfer to the States of property rights in or control over nonnavigable water or watercourses.

Each new state, on its creation and admission to the Union, was automatically invested with the same political powers within its boundaries as those which the original states possessed; it was invested with those political powers not conferred on the Federal Government or reserved to the people by the Constitution. In addition, as to water, the new states were invested, as were the original states, with the title to the water and beds of *navigable* streams or other bodies of water. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Shively* v. *Bowlby,* 152 U. S. 1; *United States* v. *Winans,* 198 U. S. 371; *Scott* v. *Lattig,* 227 U. S. 229, 242–243; *United States* v. *Arizona,* 295 U. S. 174; *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 15. This doctrine flows from the common law of England where a sharp distinction was made between navi-

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depend on prior appropriation and shall be limited to the water necessarily used for the purpose of irrigation and reclamation—provisions not consistent then or now with the law of all states subject to that law.

gable and non-navigable water, the water and beds of non-navigable streams and lakes being held to be the private property of riparian owners, subject to no proprietary interest of the Crown and the water and beds of navigable streams or other bodies of water being held to inhere in the Crown because the primary uses of such water were deemed to be rights of the general public. When this Court came to consider the question whether the title to the beds of streams and lakes passed to new states on their creation or remained in the United States, it held that this common law rule was decisive of the problem. *Martin* v. *Waddell*, 16 Pet. 367; *Pollard's Lessee* v. *Hagan*, *supra*; *Shively* v. *Bowlby*, *supra*.

Consequently, and pursuant to the common law, the states have proprietary control of navigable waters, and their beds, a proprietary interest which is attended by political power subject in this country, of course, to the power of the United States under the commerce clause or other provisions of the Constitution. *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690; *Arizona* v. *California*, 283 U. S. 423; *United States* v. *Arizona*, 295 U. S. 174; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377; *Oklahoma* v. *Atkinson*, 313 U. S. 508.

Thus it is obvious that, pursuant to the adopted philosophy of the common law, the creation of a state does not invest it with proprietary rights in

non-navigable waters and their beds. To the extent that the United States is a proprietor of lands or water (i. e., to the extent that it has not disposed of identified portions of them under the homestead laws, the mining laws and the water provisions of the Acts of 1866 and 1877, as discussed previously, or by other specific grant) at the time of statehood, it remains the owner after statehood. As a basis of decision in a controversy over land underlying non-navigable water, the Court said in *United States* v. *Oregon*, 295 U. S. 1, 14:

> Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York*, 271 U. S. 65, 89. For that reason upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. But if the waters are not navigable, in fact, the title of the United States to land underlying them remains unaffected by the crea-

tion of the new States. See *United States* v. *Utah, supra,* 75; *Oklahoma* v. *Texas, supra,* 583, 591.

Cf. Hardin v. *Shedd,* 190 U. S. 508; *Donnelly* v. *United States,* 228 U. S. 243, 263, 264.

The early opinions enunciating the distinction between rights in navigable and non-navigable streams show clearly that the consequences of that distinction were thought to attach equally to the waters themselves and to the lands underlying them. See *e. g. Martin* v. *Waddell,* 16 Pet. 367, 411; *Pollard's Lessee* v. *Hagan,* 3 How. 212; *McCready* v. *Virginia,* 94 U. S. 391, 394–395. In *Howell* v. *Johnson,* 89 Fed. 556, 559–560 (C. C. Mont.), it is said that title to the water of navigable streams passed to the states, but that title to the water of non-navigable streams remained in the United States. In *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra,* the Court cited that latter case with approval and as authority for its conclusion that, "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately" (295 U. S. 162), a statement which itself recognizes the identity of interest in water and lands. *Cf. United States* v. *Rio Grande Dam & Irrig. Co.,* 174 U. S. 690; *Winters* v. *United States,* 207 U. S. 564.[21]

[21] *Kansas* v. *Colorado* (206 U. S. 46, 93–94) contains dicta regarding the rights of new states to control water by what-

Not only the decisions mentioned, but also those to be discussed in the succeeding sections of this brief, dealing with the effect of state legislation and state constitutional provisions, make it abundantly clear that the creation of a state and its admission to the Union do not operate to divest the United States of title to non-navigable water on the public domain.[22] It is equally clear, of course, that the existence or creation of a state, and the effect of its police powers, do not disturb the constitutional power of Congress to manage and control, as well as to determine the methods

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ever rules they choose, from which may be inferred that those states, on creation, were invested with ownership and control of non-navigable water. That statement was made in heavy reliance on authorities dealing with *navigable* water. If it can be read as applicable to non-navigable water it is entirely unsupported and has not been followed in the later decisions already mentioned. That statement was quoted with approval in the *California Oregon* case, *supra*, but in an opinion which recognized, as originally enunciated in the *Rio Grande Dam & Irrig. Co.* case, also *supra*, that the power of states to select their own system of water law was subject to two limitations: (1) that, in the absence of specific authority from Congress, they cannot destroy the interest in the water of the United States, as owner of the land bordering on the stream; and (2) that they cannot trespass on the right of Congress to control navigation and navigability.

[22] Mention should be made of the fact that Congress, at the time of admission of new states has followed the policy of granting, by specific act, designated lands and other property to the new state. Thus, the land grants in aid of schools and other public improvements. But there are no express grants of North Platte or Platte river water to Nebraska, Wyoming or Colorado.

of disposal or use of property owned by the United States. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, and related cases including *Jourdan* v. *Barrett,* 4 How. 169; *Gibson* v. *Chouteau,* 13 Wall. 92; *Camfield* v. *United States,* 167 U. S. 518; *Butte City Water Co.* v. *Baker,* 196 U. S. 119; *Ruddy* v. *Rossi,* 248 U. S. 104; *Arizona* v. *California,* 283 U. S. 423; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Arizona* v. *California,* 298 U. S. 558; *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *City and County of San Francisco,* 310 U. S. 16; *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377; *Oklahoma* v. *Atkinson,* 313 U. S. 508; *Cf. United States* v. *County of Allegheny,* 322 U. S. 174.

c. Territorial and state legislation, or state constitutional provision, do not operate to divest the United States of title to or control over nonnavigable water

Despite the fact that the Federal origin of existing rights of appropriation of non-navigable water seems clear as a matter of history and law and despite the fact that the title of the United States to unappropriated, non-navigable water seems equally clear, the statutes or constitutions of perhaps a dozen states declare that all unappropriated water is the property of either the state or the public and some decisions in those states assert that rights of appropriation deraign not from the United States but from the state.

That came about in this way: The Federal statutes of 1866, 1870 and 1877 did not specifically cover the question whether a grant of riparian lands by the United States prior to any of those dates carried with it riparian rights. That a grant by the United States of riparian lands before 1866 did carry riparian rights and therefore prevented the acquisition thereafter of rights of appropriation and defeated the existing rights of appropriation was squarely held by the Supreme Court of Nevada in *Van Sickle* v. *Haines*, 7 Nev. 249 (1872), and by the Federal Circuit Court for Nevada in *Union Mill & Mining Co.* v. *Ferris*, Fed. Cas. No. 14,371, 2 Saw. 176. These decisions aroused popular resentment under the pressure of which many of the newer western states, including Wyoming and Colorado, repudiated entirely the common law doctrine of riparian rights,[23] and by statute or constitutional provision declared all water within the state to be the property of the public or the property of the state.[24]

The question whether the United States or the state is the source of title or rights of apropriation is no longer of importance with respect to the rights of individual appropriators. The holding of *Van Sickle* v. *Haines, supra,* and *Union*

[23] See 1 Wiel, Water Rights, (3d. Ed.) p. 96.

[24] For compilation of these provisions see 1 Wiel, Water Rights (3d. Ed.), p. 194.

Mill & Mining Co. v. *Ferris, supra,* has everywhere been repudiated; it has long been established that the Act of 1866 merely recognized rights which had already grown up with the tacit consent and approval of the United States. *Jennison* v. *Kirk,* 98 U. S. 453, 459; *Atchison* v. *Peterson,* 20 Wall. 507, 513; *Jones* v. *Adams,* 19 Nev. 78 (1885).

Inasmuch as the basic assertions of state or public title in unappropriated water appear primarily in legislative acts or constitutional provisions, rather than in court decisions, their theoretical bases are not well developed. One argument in favor of state title, stated in *Farm Investment Co.* v. *Carpenter,* 9 Wyo. 110 (1900), and in *Willey* v. *Decker,* 11 Wyo. 496 (1903), is that the rejection of the common law doctrine of riparian rights and the adoption of the doctrine of appropriation served to defeat the Federal title. Apparently two theories lie behind that argument: (1) That, the common law doctrine of riparian rights being inapplicable to western conditions, the United States never acquired rights in western water; and (2) that, even if the United States did originally acquire rights in western water, they were lost by the adoption through territorial or state legislation or state constitutional provision of the doctrine of appropriation.

The disproofs of the first proposition are obvious and decisive. As already shown, by acqui-

sition of the territory the United States obtained complete dominion, both sovereign and proprietary (except as to private rights then in existence, of which there was none in the North Platte Valley). The rights in water in that territory were and are property rights under either the riparian or appropriation doctrine, as already shown. The fact that those rights have somewhat different incidents under the two doctrines of water law is immaterial; whatever may have been the incidents of those rights, the United States owned them."[a] Furthermore, the Government's claim of ownership is in no way dependent on the theory of riparian rights. "The Government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams." *Atchison* v. *Peterson*, 20 Wall. 507, 512.

The second proposition (i. e., that the rights of the United States were lost through adoption by the territories or states of the appropriation doctrine) has a related answer. Since the rights in water under either the riparian or appropriation theory are real property rights, there is nothing in the adoption of one theory to the exclusion of

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[a] "That is admitted in this litigation by the answers of each of the three States to paragraph three of the first cause of action of the Government's Petition of Intervention.

the other which changes the ownership of those rights. All that is determined is the method of acquisition by individuals of rights in water from the United States and, perhaps, some details of the permissible methods and extent of use by those individuals after acquisition of the rights.

Furthermore, it is abundantly clear that a state or territory cannot affect in any way any property rights of the United States by the rejection of one rule of law or the adoption of another. *United States* v. *Oregon*, 295 U. S. 1, is the leading recent illustration of this principle. That case involved a controversy over the ownership of non-navigable lake beds. Oregon claimed title under a state statute which declared the State to be the owner of the beds of all meandered lakes. This Court held that title remained in the United States to the extent that it was not passed by the United Sates to the grantees of the uplands. The Court said (pp. 27–29):

> The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control. *Wilcox* v. *Jackson*, 13 Pet. 498, 516, 517; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; see *Brewer-Elliott Oil & Gas Co.* v. *United States*, *supra*, 88; *United States* v. *Utah*, *supra*, 75. The construction of grants by the United States is a Federal not a state question, *Packer* v. *Bird*, 137 U. S. 661, 669, 670; *French-Glenn Live Stock Co.* v.

Springer, 185 U. S. 47, 54; *Chapman & D. Lumber Co.* v. *St. Francis Levee Dist.*, 232 U. S. 186, 196, and involves the consideration of state questions only in so far as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. See *Oklahoma* v. *Texas, supra*, 594; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404. In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted. But no such question is presented here, for there is no basis for implying any intention to convey title to the State.

The State, in making its present contention, does not claim as a grantee designated or named in any grant of the United States. It points to no rule ever recognized or declared by the courts of the State that a grant to individual upland proprietors impliedly grants to the State the adjacent land under water. The only support for its claim is the statute of 1921, adopted subsequent to every grant of the United States involved in the present case. The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have

> not passed to the individual upland proprietors, remain the property of the United States. Such action by the State can no more affect the title of the United States than can the similar legislative pronouncements that streams within a state are navigable which this court has found to be nonnavigable. See *Oklahoma* v. *Texas, supra,* 75; *United States* v. *Utah,* 283 U. S. 75, supra; *United States* v. *Holt State Bank, supra,* 55, 56.

The citations contained in the above quotation are all in point in relation to the present controversy. So, too, is the old case of *Jourdan* v. *Barrett,* 4 How. 169, in which a right to land was claimed on the basis of continuous and undisturbed possession for the Louisiana statutory period and in which the Court said (p. 185):

> By the Constitution, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" for the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; so Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no State law, whether of limitations or otherwise, can defeat such title.

On this same subject the following, *inter alia*, is stated in 1 Kinney Irrigation and Water Rights, 2d Ed., pp. 657–660:

> The adoption in the constitution of a State, or the enactment by its legislature, of a provision that all the waters within the State are the property of the State or the public, can in no way affect the rights of the United States in and to those waters, but all rights acquired by the State must be subject to the rights of the general Government. * * *
>
> And hence it follows that the dedication by a State constitution, or by legislative enactment, of all its waters to the public can only be effective as to those waters in which the United States has no interest. * * *
>
> A State, therefore, has the power to dedicate its waters to itself or to the public, as far as its own rights in those waters are concerned, and to regulate the use between its citizens. But to hold that a State constitutional convention or a State legislature could virtually appropriate all the waters flowing over the public domain and belonging to the United States to itself, and acquire a good title thereto, would be too much like holding that an individual could make a deed to himself of other people's property and acquire a good title thereto. But as far as its own internal affairs are concerned, and the control and jurisdiction of the waters within the State among its

own citizens, such a dedication in a State constitution is the fundamental law of the State.

Mr. Kinney's specific reference to state constitutional provisions dedicating water to the state or the public is appropriate in view of the suggestion that the United States, by admitting a state to the Union with such a constitutional provision, transferred its title to the state or the public. Cf. *Stockman* v. *Leddy*, 55 Colo. 24, 28–29 (1912); *Farm Investment Co.* v. *Carpenter, supra.* This suggestion seems to be founded on the concept that a state constitutional provision has a basis of effectiveness greater than that of state or territorial legislation, as has been heretofore discussed, because either it operates as Congressional legislation, since the sanction of Congress is required for the admission of a new state, or because the constitution serves in effect as a compact between the state and the United States.[26]

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[26] The logical bases of this suggestion are not clearly developed, but the ones stated here are the only ones which we conceive to be logically possible.

Of the few cases (all state court cases) which counsel have found asserting that these state constitutional provisions regarding water defeat the Federal title, none attempt really to analyze the proposition, and we have found only one which refers to outside authority. *Farm Investment Co.* v. *Carpenter*, 9 Wyo. 110, 135, 136 (1900), cites as authority, *McCornick* v. *Western Union Telegraph Co.*, 79 Fed. 449 (C. C. A. 8). In that latter case the question was as to the right of removal to the United States court of a cause that was pending in one of the Territorial courts of Utah at the time

By the Act of March 3, 1875, c. 139, 18 Stat. 474, Congress authorized the inhabitants of Colorado to form a state government and to adopt a constitution. The constitution subsequently adopted included a clause dedicating water not theretofore appropriated to the public subject to appropriation as therein provided (Constitution of Colorado, Art. XVI, sec. 5). Without submission of the Constitution to Congress, Colorado was admitted on proclamation of the President (19 Stat. 665). The Wyoming Constitution, however, was adopted by the people of Wyoming without a prior authorizing act of Congress and the State was thereafter admitted by act of Congress which "accepted, ratified and confirmed the Constitution" (26 Stat. 222). This Constitution contained a dedication of water to the state (Constitution of Wyoming, Art. VIII, sec. 1).

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of the admission of the State. By specific provisions in the enabling act Congress had empowered the constitutional convention to provide by ordinance for the transfer of all such cases to the Federal and State courts. The convention, pursuant to that authority, embodied a provision for that purpose in the constitution. The question before the Circuit Court of Appeals, and the one which that court considered, was whether or not what Congress had done amounted to an unconstitutional delegation of its own powers. The decision was that it did not. This is far from holding, as the Wyoming Court states, that "all the provisions of the Utah constitution were invested with all authority conferred by an act of Congress" or that property rights of the United States would pass to a state by an assertion of ownership of them in a state constitution.

How can it be said that a recitation or declaration of public ownership of water in the Colorado Constitution can effect a divestment of Federal rights in unappropriated, non-navigable water when Congress, the only agency with power under the Federal Constitution to dispose of Government property, never saw or acted on the Constitution? The answer lies in the question itself. It is inimical both to reason and to our constitutional form of government to suppose that a state, by its own act, even though that act find expression in its Constitution, can divest the United States of property which the states by adoption or acceptance of the Federal Constitution said should be disposed of only by action of the Congress.

Wyoming is in no better position than is Colorado, by reason of the fact that Wyoming's Constitution was specifically approved by Congress. It would be strange doctrine, indeed, if one state could secure rights denied to another merely by following an alternative method of recognition and admission to the Union.

It is clear, however, that, irrespective of the method of admission of a new state, a provision of its Constitution can have no effect as legislation by Congress. The state constitution is subject to amendment at the will of the people of the state, a fact inconsistent with the concept that any state constitutional provision has the effect of an enactment by Congress. That has been recog-

nized in the leading case of *Coyle* v. *Smith* (*Coyle* v. *Oklahoma*), 221 U. S. 559, where the Court, in speaking of a constitution which was before Congress and approved by it, said (p. 568):

> A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a State constitution, and not that of an Act of Congress.

It is equally clear that state constitutions do not and cannot constitute a compact or contract between the states and the United States. *Coyle* v. *Smith, supra; Pollard's Lessee* v. *Hagan,* 3 How. 212. Those cases held that there is no compact binding on the state. In those circumstances neither can there be one binding on the other party, the United States.

Here, again, it is significant that a state may alter or amend its constitution, a privilege hardly consonant with the existence of a compact or contract. The pertinence in the present case of the right of a state to amend its constitution is pointed up by the fact that the original Nebraska Constitution contained no dedication of water to the public or to the state although the new constitution of Nebraska, adopted in 1920, does contain a dedication to the public in Article XV, sec. 5.

It is on these bases that the state constitutional and statutory provisions are inoperative in affecting the rights of the United States in non-navi-

gable water. Those provisions do, of course, operate in respect to navigable water, subject to the paramount right of the United States to control and use that water for commerce, and also operate as a portion or adjunct of the state law of appropriation by compliance with which private rights may be acquired from the United States pursuant to the Act of Congress of 1866.

d. The great majority of state and lower federal court decisions support the view that rights of appropriation derive from the United States

In the preceding subsection reference has been made to certain state court cases holding that the United States is not the source of rights to appropriate non-navigable water. It has been shown that those cases are basically unsound. Furthermore, they are not effective authorities on the point involved since the United States was not a party to those cases and since the question is a Federal one and must be determined by the laws and usages recognized and applied in the Federal courts. *United States* v. *Oregon*, 295 U. S. 1, and the cases there cited.

In this brief we have already discussed the controlling Federal authorities, primarily those of this Court, pertinent to the question of the Federal origin of appropriative rights. It may be well to point out, however, that the great majority both of state and lower Federal court decisions either announce or assume that rights to divert

non-navigable water in the western states are acquired from the United States." See, *e. g.*, *Union Mill & Mining Co.* v. *Ferris*, Fed. Cas. N. 14,371, 2 Saw. 176 (C. C., Nev.); *Howell* v. *Johnson*, 89 Fed. 556, 559–560 (C. C., Mont.); *Cruse* v. *McCauley*, 96 Fed. 369, 373–374 (C. C., Mont.); *Morris* v. *Bean*, 123 Fed. 618, 619; 146 Fed. 423 (C. C., Mont.); *Anderson* v. *Bassman*, 140 Fed. 14, 20–21 (N. D., Cal.); *Winters* v. *United States*, 143 Fed. 740, 747 (C. C. A., 9); *United States* v. *Conrad Investment Co.*, 156 Fed. 123, 126–128 (C. C., Mont.); *United States* v. *McIntire*, 101 F. 2d 650, 654 (C. C. A., 9); *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334, 336–337 (C. C. A., 9); *Osgood* v. *El Dorado Water, etc., Co.*, 56 Cal. 571, 580 (1880); *Lux* v. *Haggin*, 69 Cal. 255, 336 *et seq.* (1886); *Smith* v. *Hawkins*, 110 Cal. 122, 125 (1895); *Wood* v. *Etiwanda Water Co.*, 122 Cal. 152, 157–158 (1898); *Platte Water Co.* v. *Northern Colorado Irr. Co.*, 12 Colo. 525 (1889); *Le Quime* v. *Chambers*, 15 Idaho 405, 410, 412–413 (1908); *Story* v. *Woolverton*, 31 Mont. 346, 353–354 (1904); *Cottonwood Ditch Co.* v. *Thom*, 39 Mont. 115, 118 (1909); *Van Sickle* v. *Haines*, 7 Nev. 249, 260, *et seq.* (1872); *Jones* v. *Adams*, 19 Nev. 78, 86 (1885); *Crawford Co.* v. *Hathaway*, 67 Neb. 325, 356–357, 363 (1903); *Nevada Ditch Co.* v. *Bennett*, 30 Ore. 59 (1896); *Hough* v. *Por-*

" No effort has been made to segregate cases where states had been formed at the time of appropriation, or to exclude cases previously cited herein.

ter, 51 Ore. 318, 389 (1909). Cf., *Burley* v. *United States*, 179 Fed. 1, 12 (C. C. A., 9); *Smith* v. *Denniff*, 24 Mont. 20, 21–22 (1900); *Benton* v. *Johncox*, 17 Wash. 277, 289 (1897); *Kendall* v. *Joyce*, 48 Wash. 489, 493 (1908). But cf. *Twin Falls, etc., Co.* v. *Caldwell*, 242 Fed. 177 (C. C. A. 9).[28]

e. The concept of equality of rights among the States of the Union is not involved here.

It has been strenuously urged that failure to recognize the operative effect of the state constitutional provisions, discussed in subsection "c" hereof, on non-navigable, unappropriated water, and related failure to recognize either title in or control over such water in the states involved in this litigation would serve to deprive them of equality with the older, eastern states which are said to have full rights to control the use of and the law applicable to all non-navigable water.

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[28] Some text writers assert unequivocally that private rights to appropriate water of the streams of the west are derived from the United States. See Gould, Waters (3rd Ed.), pp. 473–474; 1 Kinney, Irrigation (2d Ed.), p. 1086; Pomeroy, Water Rights (2d Ed.), pp. 22, 32–35, 48–49, 51. Wiel says that the state courts are about evenly divided upon the question. 1 Wiel, Water Rights (3rd Ed.), pp. 185, 137–144. Wiel reaches this conclusion by treating every holding that riparian rights do not exist in a particular state as a holding against the Federal origin of rights of appropriation, even though the opinion does not mention the latter question. That recognition of the Federal origin of rights of appropriation does not necessitate recognition of riparian rights is clear. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142.

We submit that there can be no substantial basis for such a contention. Non-navigable water in the more humid parts of the country does not belong to the states, it belongs to private owners. The states, however, do have a power to control its use and to prescribe the law applicable thereto, within the limits of the police power of the states. In all of those states the riparian doctrine (speaking generally, which is all that is required for present purposes) is in force. The United States retains no rights in water, except as they may attach to specific parcels of land which the United States owns. In those western states, however, where the doctrine of appropriation is recognized, original creation or present existence of private ownership of land does not carry with it any rights in water, under state law or under Federal law, as we have already seen.[29] The Federal Government separated the land and the water and disposed of each separately. The fact that some of the non-navigable water (that which is unappropriated at any given point of time) still belongs to the United States and therefore is subject to its control rather than that of the states is an incident of the Congressional control over such property recognized and granted by the Federal Constitution.

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[29] That land grants prior to 1866 did not create or carry with them riparian rights which could defeat appropriative rights recognized or initiated under the Act of 1866 was shown in subsection "b", *supra*.

The powers of the states to control the use of non-navigable water is the same in the east and in the west. The operative effect of those powers in the western states is somewhat curtailed because of the historical happenstance that some such water remains in the ownership of the United States, whereas little or none does in the eastern states. But the powers of the states are the same in each instance, and the constitutional power of Congress over Federal property is the same in each instance.

This situation no more creates an inequality of right among states than does the fact that there are public domain lands in western states owned and controlled by the United States, whereas there are few or none in the eastern states. Yet no one can or does suggest that therein lies any basis of inequality among states. Cf. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 403–405.

2. The Reclamation Act and the incidents of the initiation and operation of the reclamation projects do not serve to disturb ownership or control of the United States in non-navigable, unappropriated water, but do serve to establish the right of the United States in the ownership and control of water for the projects

Pursuant to the foregoing discussion, the United States owns and, as provided in the Constitution, the Congress controls the disposition and use of unappropriated, non-navigable water in the states where the doctrine of prior appropriation is recognized and where, consequenty, the Act of 1866 is operative. Unless, then, the Reclamation Law,

or the legal incidents of the initiation and operation of reclamation projects pursuant to that law, disturb the Federal ownership and control of the unappropriated, non-navigable water taken by the United States for use on those projects, that ownership and control continues as to project water.

There can, of course, be no question as to the right of the United States, acting by or under the sanction of Congress, to withhold its property from disposal. Thus withdrawals or reservations of public lands, from disposal under the otherwise applicable homestead, mining or other laws, are common and legally effective. Reference need be made merely to the leading case of *United States* v. *Midwest Oil Co.*, 236 U. S. 459. And so, too, reservations of water are effective to remove the water reserved from the operation of the Acts of 1866, 1870 and 1877. In *Winters* v. *United States*, 207 U. S. 564, 577, this Court said, "the power of the Government to reserve waters and exempt them from appropriation under the state laws is not denied, and could not be", speaking of a reservation created after 1877. To the same effect are *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (C. C. A. 9); *United States* v. *McIntire*, 101 F. 2d 650 (C. C. A. 9); and *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334 (C. C. A. 9). The reservation may, of course, be consummated by an official of the executive branch of the Government, so long as he acts with the sanction of Congress. *United States*

v. *Midwest Oil Co., supra* (as to land); *United States* v. *Walker River Irr. Dist., supra* (as to water). Nor does it matter whether the action which effects the reservation is called a reservation, a withholding, a mere using, or what not.

> When the government established the reservation, it owned both the land included therein and all the water running in the various nearby streams to which it had not yielded title. It was therefore unnecessary for the government to "appropriate" the water. It owned it already. All it had to do was to take it and use it. [*Story* v. *Woolverton*, 31 Mont. 346, 353 (1904).]

Consequently, the United States could merely take the then unappropriated water and use it for the North Platte and Kendrick reclamation projects, to the extent needed for those projects, irrespective of the form of the "taking". No specific form of reservation of water, and even no *reference* to a reservation or use of water, was found necessary to create the reservation in the *Winters* case or the Federal cases cited immediately after it in this paragraph. The remaining question, then, is whether the United States, under the Reclamation Law, did reserve water for the North Platte and Kendrick projects and does retain the ownership of and the control over that water.[20]

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[20] On page 174 of his report the Special Master suggests that "it would be particularly difficult to suppose authority" to reserve water for privately owned land served by a reclamation project. We believe that the existence of privately owned

It has been urged that Section 8 of the Reclamation Act, *supra*, either constitutes or recognizes a grant to the states of the unappropriated, non-navigable water, or of the right to control such of that water as may be used on or for reclamation projects set up under that act.

The Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388, which is incorporated with its various amendments and supplements in 43 U. S. C., sec. 371, *et seq.*, authorizes the Secretary of the Interior to undertake the construction of irrigation works "for the storage, diversion, and development of waters" for the reclamation of irrigable portions of the arid public lands, and appropriates for such construction the receipts from the sales of public lands in certain states. (Later,

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lands along with public lands on a reclamation project is immaterial. The water being separate from the land by reason of the Desert Land Law (which applies to Wyoming where all storage and diversions for the projects are made), if it were not so before, there is no limit on the purpose or reason for which the United States, in controlling its separate property, may make a reservation. The Secretary of the Interior, however, is limited by Congress and can reserve water only to the extent contemplated by the Reclamation Act (not by general order "for all possible future projects" as the Special Master suggests on page 174 of his report). That the Reclamation Act validly permits the delivery of project water to private lands along with public lands on a project has, we believe, not been seriously questioned since the decision in *Burley* v. *United States*, 179 Fed. 1 (C. C. A. 9), in which the court also recognizes the right of the United States to reserve water for such lands under the Reclamation Act (179 Fed. 11–13).

additional funds were appropriated.) The lands which are to be irrigated from any particular project which is undertaken are to be disposed of in small tracts as the construction of the project progresses, each disposal to carry with it a right to water from the project subject to certain conditions. The terms of disposal are to be such that the cost of construction and maintenance will, ultimately, be borne by the purchasers. The act also permits other owners of small tracts of land to acquire rights to be supplied with water from the project, by assuming the payment of charges to be fixed by the Secretary.

Section 8 of the Reclamation Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right.

It is clear, we submit, that this section, or any other provision of the Reclamation Act for that matter, cannot be a grant to or a recognition of any title or right in the states; it cannot in any way affect title to water, for it says just that in plain language. "* * * nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator or user of water in, to, or from any interstate stream or the waters thereof." The North Platte River is, of course, an interstate stream, and, being such, there can be no question that the Reclamation Act has no effect whatsoever on the question presented here. It was the intent of Congress that all rights in water of interstate streams be left just as they were before passage of the act. *Wyoming* v. *Colorado*, 259 U. S. 419, 463.

That would seem to dispose of the matter, at least so far as the question of title is concerned. It has been suggested, however, that a contrary conclusion is required by the language of this Court in denying Wyoming's motion to dismiss this very case on the ground, among others, that the Secretary of the Interior was a necessary party. The Court said (295 U. S. 40, 43):

> The bill alleges, and we know as matter of law [citing Section 8 of the Reclamation Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain

permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. *His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state.* He is not a necessary party. [Emphasis added.]

There was no basis in law for Wyoming's suggestion that the Secretary of the Interior was an indispensable, or even a proper, party to the proceeding. The water rights here in question are those of the United States, not of the Secretary. It is well settled that in litigation involving the validity or extent of rights of appropriation for Federal reclamation projects, the United States is the party in interest. *Ide* v. *United States*, 263 U. S. 497, 506; *West Side Irrigating Co.* v. *United States*, 246 Fed. 212, 217 (C. C. A. 9); *United States* v. *Union Gap Irrigation Co.*, 209 Fed. 274, 276 (E. D. Wash.). *Cf. United States* v. *Bennett*, 207 Fed. 524 (C. C. A. 9); *United States* v. *Union Gap Irrigation Dist.*, 39 F. 2d 46 (C. C. A. 9); *Ramshorn Ditch Co.* v. *United States*, 269 Fed. 80 (C. C. A. 8); *United States* v. *Haga*, 276 Fed. 41 (S. D. Idaho); *Pioneer Irrig. Dist.* v. *American Ditch Assn.*, 50 Idaho 732, 749 (1931).

The language of the Court in denying Wyoming's motion and in particular the italicized sentences, may, however, imply that neither the United States nor the Secretary was a necessary or appropriate party to the proceeding, and that this was so for the reason that the rights of the United States in the water of the North Platte River were not rights of ownership but were inferior rights derived from and subject to protection by the State of Wyoming. It is submitted that the action of the Court in permitting the United States to intervene in this suit, pursuant to the Government's motion made in heavy reliance on its claim of ownership, precludes any implication that the Court meant to deny the fact of Government ownership in its action on Wyoming's Motion to Dismiss.[21]

Furthermore, it is believed that the suggested interpretation of the Court's action on Wyoming's motion to dismiss cannot be the one intended by the Court. If it were it would require the conclusion that, by the very act in which it authorized the expenditure of millions of dollars for the development and use of unappropriated water and in which it provided rules for the use of that water, Congress relinquished the rights of

[21] The action of the Court permitting intervention does not, of course, decide the issue of Government ownership or control either way, having been made expressly without prejudice to the final determination of all substantive questions. 304 U. S. 545.

the Government in that water. Such a conclusion is consonant neither with reason nor the language used by the Congress.

The first clause of Section 8, announcing noninterference with local water laws and vested rights thereunder, is a mere recognition of existing rights and local laws—a mere declaration of the continued effect of the Act of 1866.

The second clause merely instructs the Secretary of the Interior, as the Government's agent for administering the act, to proceed in conformity with local law; it does not grant title to the states and therefore cannot be interpreted as a divestiture of Federal control over water since, as has been already pointed out, Congress cannot disable itself from exercising its constitutional control over Government property. That second clause can only be, and only is an instruction consonant with and parallel to the policy of the Act of 1866 that state or local rules be adopted as defining the patterns to be followed in the disposition or use of Government water. But the person to follow the pattern of the local rules in this instance is not a private appropriator who seeks to establish rights in the water; it is the Secretary of the Interior who, in acting for the United States, is to make use of water, the title to which is already in the United States. He is to follow the local pattern, not as a means of acquiring a right in water, for that already exists, but as a

means of exercising the rights of use of that water in a manner consistent with that which governs private use. It is, in a sense, a "conformity clause." In the absence of any grant or divestment elsewhere of title to the water, it can be nothing more than that. And, obviously, it, itself, can not be a grant or divestment of title in such circumstances.

This conclusion follows entirely independently of the third clause of Section 8, providing that nothing in the act shall affect the rights of anyone, including the United States, on interstate streams. Consequently, Section 8 contains no grant of title or abdication of control even as to *intra*-state streams, a conclusion also bolstered by the fourth and final clause (the proviso) of Section 8 which prescribes that "the right to the use of water acquired under the provisions of this Act" shall be appurtenant to the land irrigated. Obviously that clause, by referring to acquisition by water users of water rights *under* the Reclamation Act, contemplates that the act itself, not state law, operates to create the rights. Equally obviously that clause undertakes to prescribe a rule of appurtenance irrespective of state law which in Colorado does *not* recognize water rights as appurtenant to land (*Hassler* v. *Fountain Mutual Irr. Co.*, 93 Colo. 246 (1933); *Cache la Poudre Irr. Co.* v. *Larimer & Weld Res. Co.*, 25 Colo. 144 (1898)) and which in Wyoming did

not so recognize them until 1909, after the enactment of the Reclamation Act (compare Wyo. Laws, 1905, c. 97, with Wyoming Laws, 1909, c. 68). Clearly Congress itself exercised control in that instance and the Secretary is not directed to follow the state law regarding appurtenance in carrying out that provision of the act.

The situation, then, comes to this: Congress, in the exercise of its constitutional control over the United States' property in non-navigable water, has directed the Secretary to conform to state laws and procedure except where Congress has exercised its control directly in prescribing rules which may be in conflict with state rules.[25] That is far from an abdication by Congress to the states of ownership or control over unappropriated, non-navigable water taken and used for reclamation projects. That Congress, elsewhere in the Reclamation Act and in supplemental legislation, has directly provided other rules also which conflict with state law, merely serves to emphasize this meaning and significance of Sec-

[25] Whether the congressional injunction that the Secretary follow state law, with the qualification mentioned, is directory or mandatory is immaterial to this case. The United States maintains, however, that it is and in the circumstances can be directory only, in the sense that no state or private person could maintain suit or take other action based on non-compliance by the Secretary with state law. This concept is of vital importance in situations other than that involved here. See pp. 68–72 of Motion on behalf of the United States for Leave to Intervene in this case.

tion 8.[33] The Secretary, of course, must pursue those express directions from Congress, not the inconsistent state law.

Thus, it is clear that the United States retains its control, based on ownership, of project water and must be protected by this decree in its continued right of control, its continued right to deviate from state law and to be free from state control in those matters where Congress has or hereafter may prescribe rules and controls contrary to those recognized or established by state law.[34] And it necessarily follows, of course, that

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[33] The more significant of these provisions are collected in Appendix II, of this brief, with comment thereon where appropriate.

[34] It is the United States' position that the language of the Reclamation Act so clearly supports this conclusion that the principle of statutory construction preclude resort to the legislative history. But if the legislative history is considered as a whole this conclusion is further sustained. It may be noted that Mr. Mondell, in charge of the bill in the House, explained that Section 8 "instructs" the Secretary "to conform to" state and local law and "specifies the character of the water right which is provided for under the provisions of the act." 35 Cong. Rec., pt. 7, p. 6678. Also he referred to the fact that, since 1866, Congress had recognized local law in the appropriation of water and that, in the bill (Reclamation Act) "it has been deemed wise to continue our policy in this regard", clearly recognizing Congress' power and intent to dictate the method of control to be exercised. 35 Cong. Rec., pt. 1, pp. 6679–6680. Of primary significance, however, is the fact that the bill as originally passed in the Senate contained, in Section 8, a clear-cut adoption of state law (S. Rept. No. 254,

the United States must be recognized as entitled to apportionment to it of project water. The State of Wyoming or any other state is incapable of standing in judgment for the United States since the state is and always has been a complete stranger to the title held by the United States, since state law cannot of its own force affect the use or disposition of Government property and since no state can represent the United States as *parens patriae*, in which capacity a state does represent individual owners of water rights in a case such as this (*Kansas* v. *Colorado*, 185 U. S. 125, 142; *Louisiana* v. *Texas*, 176 U. S. 1, 19; *Missouri* v. *Illinois*, 180 U. S. 208, 236). *Cf. Arizona* v.

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p. 9, 57th Cong., 1st Sess.), but that clause was stricken in the House which substituted for it the enacted clause merely instructing the Secretary to proceed in conformity with state law. (H. Rept. No. 1468, pp. 18, 20, 57th Cong., 1st Sess.)

The Special Master has apparently reached contrary conclusions on this matter and refers, by footnote on page 175 of his report, to the legislative history in support of those conclusions. However, when the legislative history to which reference is made in that footnote is read in entirety it does not sustain his conclusion. The Special Master's footnote also refers to the departmental interpretation of the Reclamation Act in 32 Interior Decisions at page 254. That decision has to do only with the authority of the Secretary to withdraw land and water extensively for possible future projects and holds against that authority in the circumstances there stated. More pertinent, we submit, is the decision in 37 Interior Decisions at page 6, particularly page 10, which interprets the act in a manner comparable with that incorporated in this brief.

California, 298 U. S. 558, and the many cases holding that state laws or instrumentalities cannot control the use or disposition of property of the United States, among them *Jourdan* v. *Barrett*, 4 How. 169; *Gibson* v. *Chouteau*, 13 Wall. 92; *Camfield* v. *United States*, 167 U. S. 518; *Butte City Water Co.* v. *Baker*, 196 U. S. 119; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Ruddy* v. *Rossi*, 248 U. S. 104; *Arizona* v. *California*, 283 U. S. 423; *Ashwander* v. *T. V. A.*, 297 U. S. 288; *Minnesota* v. *United States*, 305 U. S. 382; *United States* v. *City and County of San Francisco*, 310 U. S. 16.

There remains, however, the question whether the actual incidents of the initiation and operation of the North Platte and Kendrick projects, pursuant to the provisions of the Reclamation Act and supplemental statutes, have served in any way to divest the United States of the title to and control over the water of the North Platte and Kendrick projects. It has been urged heretofore and the Special Master apparently concludes that, in acting under Section 8's instruction that he proceed in conformity with state law, the Secretary necessarily has not reserved or withdrawn the unappropriated water for project use, but has instead followed procedures which invest title in the project water users as appropriators under state law (except, perhaps, as to storage

water). Special Master's Report, pp. 172–174, 176.

In that connection let it be pointed out at the outset that if Section 8 disposes of neither the ownership nor control of the unappropriated water used for project purposes, as the United States contends is so, then it is most difficult to see how the Secretary's action pursuant to that section can result in a loss of ownership or control. Furthermore, the various statutory provisions mentioned or stated in Appendix II of this brief demonstrate conclusively that, although the Secretary proceed as far as he can in conformity with state law as directed in Section 8, Congress contemplates and requires that he exercise various controls over the use of project water irrespective of state law and in what can only be the exercise of the Federal control which emanates from Federal ownership of the water to be used.

Basic in this consideration is the fact that the United States owns the unappropriated water from which the project water comes. The rights to use that water acquired by the project water user flows, then, from the United States, not the state. Conformity with state law by the Secretary is not for the purpose of securing water from the state or "under" state law; it is and can be only for the purpose of conformity itself in the process of establishing the Government's use of water for project purposes, in removing

the water from the category thereafter of unappropriated water subject to disposal to other persons by appropriation under the Act of 1866 and pursuant to state law, or in "reserving" the water. Nor does conformity with state law define the rights of use acquired by project water users; those are clearly defined in the Reclamation Law (including supplemental legislation) itself and, as has been seen, in many respects inconsistently with their definition under state law.

Thus the fact that the Secretary filed applications for use of water under state law determines nothing. It does, however, constitute notice to the public, in the forms provided by state law, of the removal of the water filed on from the category of water remaining open to appropriation. It, in every practical sense, effectuates the "reservation" of water. That being so, the reservation thereafter exists, for legally no special form of reservation is necessary for the United States effectively to reserve water from future disposition by appropriation. *Winters* v. *United States; United States* v. *McIntire; United States* v. *Walker River Irr. Dist.*—all *supra*. "It was unnecessary for the government to 'appropriate' the water. It owned it already. All it had to do was take it and use it." *Story* v. *Woolverton, supra.*"[38]

[38] Actually the withdrawals of public lands irrigable under the projects, as set out in the preceding statement of facts,

Nor is anything determined by the fact that the proofs of use of water were submitted by the irrigation districts of the projects, rather than by the United States, or the fact that the state officials adjudicated or decreed water rights directly to project water users.[38] It is not deniable that the United States initiated the state procedure by making the basic filings, nor that, at least prior to the application of water to use by project water users, the United States held the water rights. The action of state officials in subsequently adjudicating the water to someone else could be effective only if the United States did not own the water or if Congress had so authorized the state officials. That Congress has not is clear from the fact that it has itself fixed the method of acquiring rights to use water by individuals on reclamation projects and has defined those rights. The action of the state officials can be nothing more than their understanding or antic-

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was adequate to reserve the water needed for their irrigation, by direct analogy with the *Winters* case. Private lands, however, also are served by the project. As to them, the water filings are effective and fix the date of the project reservation of water. Also it seems probable, in view of Section 8 of the Reclamation Act, that those filings likewise fix the date of the water reservation for public lands and therefore, in practical effect, may be treated as the reservations themselves, which certainly they are in any event if the land withdrawals were not effective reservations of water.

[38] In this connection see the Special Master's Report, page 173, and the preceding statement of facts in this brief.

ipation of the conclusion of the controversy over ownership which is now before the Court for determination; that action cannot control the determination to be made.

The United States submits, however, that the state officials did not even undertake to determine that issue. It will be noted that they carefully recited that the applicants for the adjudication of rights had, by contract with the United States, acquired some undefined right in the permits adequate to permit of the adjudication (third paragraph of Nebr. Ex. 571 and Wyo. Ex. 7; fourth paragraph of Nebr. Ex. 576). Furthermore, the actual certificates of adjudication, as issued, are expressly said to be subject to the terms of the contracts with the United States (Nebr. Exs. 572, 577; Wyo. Ex. 8). In those circumstances it seems apparent that the contracts between the United States and its water users control, and that the adjudications were subject to whatever legal conclusions might flow therefrom.

It has heretofore been urged that the contracts between the water users and the United States establish the fact that the water users, rather than the United States, are the owners of their water rights.[11] In that connection reference has been made to the contractual provisions that operation and maintenance has been (as to Kendrick, will

[11] Reference to this situation is also made by the Special Master in the footnote on page 173 of his report.

be) turned over to the irrigation districts, that reservoir water is to be delivered to the districts on their order (subject to conditions) and that the distribution of stored water, after release from the reservoirs, shall be in charge of "the proper state officers or other officers charged by law with the distribution of stored water from North Platte River." Clearly those provisions are not controlling, either way. The operation and maintenance by the districts, which does *not* go to the storage or *diversion* works, can as well be in the capacity of an agent; the fact that the districts can order the delivery of water, subject to conditions, is in no way foreign to a relationship which does not involve a transfer of title to the water rights; and the provision regarding distribution of storage, *after* its release from reservoirs, expressly is ambiguous for present purposes by mentioning "state officers or other officers." Other provisions of the contracts, however, *are* pertinent. Thus, in the Pathfinder Irrigation District contract (Nebr. Ex. 570), we find that the United States official is given duties regarding the deliveries of water (Art. 30);[*] that no title to *any* of the irrigation or drainage works passes to the district, thereby clearly establishing that the district operates and maintains the "transferred works" as an agent (Art. 34); that

[*] These duties are, however, to operate "in so far as the United States has control of such delivery and distribution."

the district will operate and maintain pursuant to the terms of the reclamation laws and the rules and regulations of the Secretary "now or *hereafter*" existing, clearly showing the retained control by the United States *and* the pertinence of all provisions of the reclamation laws which heretofore have been shown to be often incompatible with state laws (Art. 37); that the district shall not substantially change the "transferred works" without the written consent of the Secretary (Art. 39); that the district may have the use of drainage water "so far as the same equitably belongs to the United States," clearly showing that, as between the United States and project users, the drain water was deemed to be in the ownership of the United States which it could be only if the United States owned the original water rights (Art. 43); that the contract can be terminated for breach on one year's notice (Art. 51); and that the water rights for district lands remain unchanged from those established pursuant to the individual water right applications theretofore made (Art. 60). Those individual water right applications, although they contain provisions varying in detail, *all* provide that they are subject to the provisions of the reclamation laws, some of them expressly recognizing that that includes the right of cancellation, *all* provide for functions of the Government officials to varying extent, in the determination of water deliveries, and most of them speak in terms of a mere delivery or furnishing of water.

U. S. Exs. 44-49. In these various circumstances, we submit, that the contracts definitely do not provide for disposition by the United States of its rights in or control over project water. The reclamation laws, with their many minute regulations of water use (often inconsistent with state law), and the proper rules and regulations of the Secretary of the Interior, control. The water user, or the irrigation district, has a *contractual* right—and one which the United States proposes to recognize and protect.[39]

The position of the United States here is not in opposition to the rights of project water users. The United States is here seeking recognition of project water rights so that it may appropriately carry out its contractual obligations to the water users dependent on the projects, and so that it may preserve the control over project water use as it has undertaken to do in those contracts and in accordance with the provisions of the reclamation laws. The fact that the United States, pur-

[39] Although the other irrigation district contracts vary in many respects from that with the Pathfinder District, they contain provisions requiring the same conclusions as to the controlling effect of the reclamation laws and the control by Government officials. See, *e. g.*, Arts. 6, 9, 25, 26, 28, 30, 34, 45 of Nebr. Ex. 567 (Gering and Fort Laramie Irrigation District); Arts. 18, 20, 23, 27, 31, 35, 42, 47 of Nebr. Ex. 574 (Northport Irrigation District); Arts. 4½, 7, 9, 24, 26, 29, 35, 37, 39, 40, 46 of Wyo. Ex. 11-A (Goshen Irrigation District); and Arts. 3, 9, 10, 11, 21, 22, 26, 27, 38, 42 of Wyo. Ex. 3 (Casper-Alcova Irrigation District). The conclusions, under these contracts, must be the same as those shown above.

suant to the reclamation laws, has invested water users with contractual rights in the use of water, does not affect the right of the United States to a decree recognizing its proprietorship of project water and apportioning such water to it.

Any doubt which might possibly exist as to this proposition is definitely set at rest by the case of *Ide* v. *United States*, 263 U. S. 497, a case arising from a Federal reclamation project diverting and using water in Wyoming, as in this case. Seepage water had appeared in a ravine on the Shoshone Project. Ide and others, owners of land in the vicinity of the project, being holders of water permits from the State of Wyoming, claimed the seepage water and threatened interference with a program of the United States for collection and use elsewhere on the project of that water. The Government brought suit to enjoin the threatened interference. Ide argued, *inter alia*, that the United States had parted with its property interest in the project water by sale to the project water users and consequently had no standing to interfere with the use of the water by him. In that connection this Court said (pp. 505–506):

> A further contention is that the plaintiff sells the water before it is used, and therefore has no right in the seepage. But the water is not sold. In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to

> irrigate his land, but it does not give up all control over the water, or to do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the plaintiff.

As a result of this the Court held that the United States, by reason of its original "appropriation" of the project water could recapture and reuse for project purposes the return or seepage flow. Clearly by both word and decision, the proprietary right of the United States was recognized as existing and as continuing despite the rights to use water which were given to project water users.

To the same effect as the *Ide* case are *United States* v. *Haga*, 276 Fed. 41 (S. D., Idaho), a portion of the opinion of which was quoted with approval in the *Ide* case, and *Ramshorn Ditch Co.* v. *United States*, 269 Fed. 80 (C. C. A., 8). *Cf. United States* v. *Tilley*, 124 F.2d 850 (C. C. A., 8), certiorari denied, *sub nom. Scott* v. *United States*, 316 U. S. 691. The latter two cases involve the Nebraska portions of the North Platte project and the latter one relies in part on the *Ide* case. Holding that the United States could recapture the seepage waters involved, the court in the *Haga* case said: "If it does not own the primary rights, of course, it is a stranger to the wastage." 276 Fed. 45.

Other types of cases in the Federal courts also have recognized the Government right in project "appropriations" as continuing. That has been recognized in various forms of statement in cases upholding the right of the United States to maintain suits to protect those "appropriations." *United States* v. *Union Gap Irrig. Co.*, 209 Fed. 274 (E. D., Wash.); *West Side Irrig. Co.* v. *United States*, 246 Fed. 212 (C. C. A. 9); *United States* v. *Humboldt Lovelock Ir., Light & Power Co.*, 97 F. 2d 38 (C. C. A. 9); *United States* v. *Bennett*, 207 Fed. 524 (C. C. A. 9). It has been recognized specifically as to water rights for power development on a reclamation project over the contention that the project water users owned those rights by virtue of their contractual interest in the profits from power development. *Burley Irrigation District* v. *Ickes*, 116 F. 2d 529 (App., D. C.), certiorari denied, 312 U. S. 687.[40]

In this connection one recent case requires mention: *Ickes* v. *Fox*, 300 U. S. 82. The case came before the Court on motion to dismiss made by the Secretary of the Interior. Briefly stated, the facts, as pleaded by the plaintiff and admitted for purposes of the motion to dismiss, were that the

[40] It is significant that the Department of the Interior early recognized the fact that, under the Reclamation Act, the United States maintained its property interest in water rights in the course of its distribution of water to water users. 33 Interior Decisions 391, 400.

plaintiffs owned lands included in the Yakima Federal Reclamation Project in Washington. Plaintiffs' predecessors, in about 1914, had entered into individual contracts, or "water right applications" and, as members of an association, had also contracted collectively with the United States for a water supply to be measured by beneficial use; after furnishing large quantities of water under those contracts for about twenty years, the Secretary, on the occasion complained of, issued an order limiting the amount of water and requiring payment of additional money for water in excess of the amount stated. The plaintiffs sought an injunction against that order, alleging that the action of the Secretary was illegal and an interference with their vested property rights. The Secretary's motion to dismiss was grounded on the claim of ownership in the water by the United States as support for the contention that the plaintiffs' rights were founded "entirely upon executory contracts" and that the relief sought was therefore, in effect, specific performance of a contract of the United States which could not be effected in a suit to which the United States was not a party.

As stated by the Court in the first sentence of its opinion, "The sole question in each of these three cases is whether the United States is an indispensable party defendant." After a discussion of the facts, as alleged, and in a discussion

of the relationship between the United States and project water users the Court said (300 U. S. 93–95):

> Succinctly stated, the case comes to this: The United States, under the Reclamation Act, constructed an irrigation system for the purpose of storing and distributing water for irrigation of arid lands. Respondents own water-rights under the system for lands of that kind; and these lands require artificial irrigation to render them productive. So far as these respondents are concerned, the government did not become the owner of the water-rights, because those rights by act of Congress were made "appurtenant to the land irrigated;" and by a Washington statute, in force at least since 1917, were "to be and remain appurtenant to the land." Moreover, by the contract with the government, it was the land owners who were "to *initiate* rights to the use of water," which rights were to be and "continue to be forever appurtenant to designated lands owned by such shareholders."
>
> Respondents had made all stipulated payments and complied with all obligations by which they were bound to the government, and, long prior to the issue of the notices and orders here assailed, had acquired a vested right to the perpetual use of the waters as appurtenant to their lands. Under the Reclamation Act, *supra*, as well as under the law of Washington, "bene-

ficial use" was "the basis, the measure and the limit of the right." And by the express terms of the contract made between the government and the Water Users Association in behalf of respondents and other shareholders, the determination of the secretary as to the number of acres capable of irrigation was "to be based upon and measured and limited by the beneficial use of water." Predecessors of petitioner, accordingly, had decided that 4.84 acre-feet of water per annum per acre was necessary to the beneficial and successful irrigation of respondents' lands; and upon that decision, for a period of more than twenty years prior to the wrongs complained of, there was delivered to and used upon the lands that quantity of water. Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy* v. *Kerr*, 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*ibid.*), with the right to receive the sums stipulated

> in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights* appurtenant thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the landowner.

Several things in that quotation are deserving of mention.[41] Near the beginning of the passage the statement is made that "respondents own water rights under the system" but it is not clear whether that refers to the water rights formerly held individually by them or to rights acquired from the project. If it means the latter then it, as all similar language, is subject to interpretation in the light of the succeeding statement that "*So far as these respondents are concerned,* the government did not become the owner of the water rights" [italics added] because those rights are appurtenant to the land. The opinion as to ownership of the Government is expressly qualified and applied only as between the Government and the landowner. More than that, it is applied only as between the Government and landowners

[41] It may be noted that the reliance, in the last sentence quoted, on the lien provision of the contract may be inadvertent in view of the fact that many of the water users of the project did have independent, partial water rights of their own as recognized by the Court at 300 U. S. 89.

who, in the language of the court, "had made all stipulated payments and complied with all obligations by which they were bound to the government and * * * had acquired a vested right to the perpetual use of the waters as appurtenant to their lands." This qualification obviously carries also to the remaining language about the ownership of the United States. It follows therefore, as necessarily it must from the nature of the controversy there for adjudication, that the Court was not concerned with and was not addressing itself to the problem of the relationship in basic ownership or control between the United States and the states, a fact amply borne out by the recitation of both Federal and local law without choice between them. The Court merely was determining whether the water users on the facts there stated had a vested right against the United States without addressing itself to the problem whether the United States nevertheless also had a right as against others. Also the Court was dealing with a situation where, on the facts there admitted, the contracts between the United States and the water users were found to be fully executed, not executory.

If this passage from the opinion in *Ickes* v. *Fox* is to be given any other, broader significance than that suggested, it is contrary to the effect of Congressional enactments which assume and depend on Federal proprietorship, as already dis-

cussed, and it is contrary to the decision of this Court in *Ide* v. *United States, supra,* which was not considered or expressly overruled, as well as contrary to the doctrine of the lower Federal court cases discussed immediately heretofore in conjunction with the *Ide* case. It cannot be assumed that the Court meant to override all or any of those authorities, and it must be assumed that it did not so intend. The opinion expressed holds only "so far as these respondents are concerned."

The actual basis of decision expressed by the Court is as follows (300 U. S. 96–97):

> The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples. * * *

It is clear that the vested property rights of the plaintiffs, with which the Secretary was said to be interfering, were rights arising out of the alleged complete performance of the contracts. The property right was one *created by contract.* Since the contract was no longer *executory,* what-

ever rights it created (and their definition is unimportant here) are to be protected from improper administrative action. That was all that was before the Court for decision; that was all that was decided. The Court did not decide the nature of the interest of the Government in the water, as the owner of the basic water right, and no such question was before the Court. Furthermore, even if it had so decided, it would have no bearing on this case where the United States itself is asserting the right. For it is familiar doctrine that the rights of the United States cannot be determined in litigation to which it is not a party, and in *Ickes* v. *Fox* the Court very specifically found that the Government not only was not a party but did not need to be one, a fact which itself disposes of any contention that the rights of the United States were there determined.

It may be pointed out that this analysis of the *Fox* case is fully supported by a consideration of *Goltra* v. *Weeks*, 271 U. S. 536, which is one of the cases cited and relied on in the *Fox* case as authority for the maintenance of suits against government officials when the Government itself is not a party. In that case Goltra had leased a fleet of boats from the United States for a period of years. There was no question that the United States retained title subject to the terms of the lease. Defendant Weeks notified Goltra

of termination of the lease for the alleged breach of its conditions and caused the seizure of some of the vessels. Goltra sought to enjoin further seizures and to secure possession of those boats already taken from him. Weeks, a cabinet member, moved to dismiss, as was true in the *Fox* case, on the ground that the United States was an indispensable party. In rejecting that contention the Court said (271 U. S. 544):

> We cannot agree with the Circuit Court of Appeals that the United States was a necessary party to the bill. The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting for the Government or not. Neither they nor the Government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and cannot be made one. By reason of their illegality, their acts or threatened acts are personal and

> derive no official justification from their doing them in asserted agency for the Government.

The Court went on to quote with approval from *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, also quoted with approval in the *Fox* case, as follows (271 U. S. 545):

> The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.

It is manifest from this case that, in determining the necessity of joining the United States, the fact that the United States has a title or other interest in the propery involved is not important. The only pertinent question is whether the administrative official performs or threatens an act which is an abuse of his power and which will affect some vested interest of the other party. And so it is in *Ickes* v. *Fox*. *Cf. Burley Irrigation Dist.* v. *Ickes*, 116 F. 2d 529 (App. D. C.); certiorari denied, 312 U. S. 687.

In fact *Ickes* v. *Fox* has been substantially so construed by two separate United States Circuit Courts of Appeals.[42] In *Berger* v. *Ohlson*, 120 F.

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[42] It is recognized, of course, that such interpretations are not binding in this case. They are, however, significant in showing the understanding of the case by other courts. It

2d 56 (C. C. A. 9) the Court in addressing itself to the problem of the responsibility of government officials for their allegedly wrongful acts, held (p. 58):

> They cannot escape personal liability by relying upon the sovereign's immunity from suit. When their authority is in question the United States is not an indispensable party, although its title to property may be incidentally involved. This action can conclude nothing against the United States, but it can and must determine the rights of appellant and appellees as between themselves. *United States* v. *Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171; *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764; *Ickes* v. *Fox*, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525.

Substantially a similar conclusion was reached in the very recent case, involving the North Platte

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may be added that, in several other lower Federal court cases *Ickes v. Fox* has been cited, but without analysis and merely as one of a group of cases to support the accepted proposition that, on facts not relevant here, a suit may be maintained against a government official who is acting outside the scope of his authority, to which is sometimes added, and in derogation of property rights of the plaintiff. In one instance, however, a District Court has cited *Ickes* v. *Fox* for the proposition that deep percolation, as distinguished from surface seepage, produces water which is "public" even as against the United States—again without discussion and, apparently, as dicta. *United States* v. *Warm Springs Irrigation District*, 38 F. Supp. 239, 242 (D. C. Ore.).

project, of *United States* v. *Tilley*, 124 F. 2d 850 (C. C. A. 8), certiorari denied, *sub nom. Scott* v. *United States*, 316 U. S. 691, in which the court upheld the Government's claim of ownership of project return flow water following the doctrine of *Ide* v. *United States* and *Ramshorn Ditch Co.* v. *United States*, both *supra*, specifically holding that the doctrine of those cases was not overthrown by *Ickes* v. *Fox*.

In these circumstances it seems clear that *Ickes* v. *Fox* is not an authority against the position of the United States in this litigation.[41]

3. The rights of the United States are not affected by the concepts that rights in water are mere rights to use and that water itself is publici juris

It has heretofore been contended by all other parties to this case that the United States can claim no ownership of unappropriated water, nor any reservation thereof and continued ownership for project use, since only the right to use water can be owned and the United States does not use it, the water itself being *publici juris* and in-

[41] The controversy in *Ickes* v. *Fox* was ultimately decided on the merits in *Fox* v. *Ickes*, 137 F. 2d 30 (App., D. C.) certiorari denied, 320 U. S. 792, the decision being predicated squarely on the opinion of this Court in *Ickes* v. *Fox* and requiring no different or additional analysis for present purpose, although it *may* be argued from certain isolated passages in the opinion of the Court of Appeals that it believes this Court to have held that the United States had no interest whatsoever in project water on the facts of that controversy.

capable of ownership. That contention, the United States submits, is untenable.

If the Government did not own the water itself (which we believe it did and does), it *did* own *all* the cognizable rights pertaining to the water, and the entire argument heretofore made is equally applicable to those rights. If those rights be merely rights to use, the United States owned them and still does as to unappropriated, nonnavigable water and as to project water, subject to whatever subsidiary contractual rights of use it has created in project water users.

The United States or an individual may own a right to use water without using it. Clearly that was true at common law. It is true also under the doctrine of prior appropriation, although it is restrictedly so under that doctrine, the usual restrictions being that the right to use can exist in the absence of actual use only when certain conditions exist and within certain time limitations which vary in different states. Those restrictions, however, are the creature of local custom and law. To suggest that those restrictions operate to define or limit the rights of the United States is legal bootstrap lifting since the basic question is whether the United States owns property [44] and whether, therefore, local law can apply. Furthermore there were no local laws, no

[44] Even a right to use water is everywhere conceded to be a property right under either the riparian or appropriation doctrine

legislatures, no courts, no customs in the North Platte or Platte valleys when the United States acquired them—there was not even a single private land holding, as heretofore pointed out. Even if one assumes, as is sometimes stated, that the riparian rule never applied in the west because it was unsuited to conditions there (see Special Master's Report, page 165), certainly no contrary rules existed before settlement of the country. The United States being the proprietor of all of the public domain, there was no occasion for original application of any particular doctrine or definition of water rights. *Cf. Atchison* v. *Peterson*, 20 Wall. 507, 512. Whatever the nature of the rights in water, they all belonged to the United States and therefore were to be dealt with, defined and disposed of *only* as Congress provided. And we have already seen that Congress retained Federal rights in unappropriated, non-navigable water and in reserved project water.[45]

Nor does it avail to invoke the phrase "*publici juris.*" It adds nothing to the concept already discussed.

Kinney on Irrigation has been heavily relied on in former arguments on this point. But Mr. Kinney's conclusions certainly do not depart from those advanced here by the United States. 1 Kinney on Irrigation (2d Ed.), pp. 657–660, 690–693,

[45] The argument made in this paragraph is similar and substantially parallel to that on pages 78–81, *supra*.

813–815. A single quotation of one of Mr. Kinney's conclusions will suffice (1 Kinney, 2d Ed., 690):

> As we have seen, the United States originally had a perfect title to all of the waters flowing upon the public domain with the exception of the use of certain waters the right to which had vested before the Government acquired the territory through which these waters flow. Hence it follows that this Government had the right to dispose of these waters as it saw fit. Being the owner of the public domain, the United States originally had the power to dispose of any estate therein, or any incident or part thereof, either together or separately. The water flowing over the public domain is a part thereof, and the National Government had the right to sell or grant the same, or the use thereof, separate from the rest of the estate, under such terms and conditions as might have seemed proper. And, where there is still water flowing in the natural streams, which is still unappropriated under some authority granted by Congress, the General Government may reserve such waters for its own use. * * *

That conclusion is fully supported by the decisions of this Court, which have been discussed heretofore. Thus it is that, in cases such as *Basey* v. *Gallagher*, 20 Wall. 670, 681, the Court spoke of "the title of the Government," and

recognized that prior to the Act of 1866, *supra*, the user of water on the public domain was regarded as the source of title in private controversies "except as against the Government"; that, in cases such as *Jennison* v. *Kirk*, 98 U. S. 453, 457, it was said that the object of the 1866 act was to give the "sanction of the United States, the proprietor of the lands, to possessory rights"; that in cases such as *Broder* v. *Natoma Water and Mining Co.*, 101 U. S. 274, 276, and *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 155, it was said that the early Congressional legislation "was rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one"; that in *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 703, the Court specifically recognized the rights of the United States to water by reason of its ownership of the public domain, "so far at least as may be necessary for the beneficial use of the government property"; that in *Gutierres* v. *Albuquerque Land & Irrigation Co.*, 188 U. S. 545, 553, the Court held that the early Congressional acts "granted" "the right to appropriate"; that in *Winters* v. *United States*, 207 U. S. 564, 577, the Court held that the power of the United States to "reserve" non-navigable waters and "to exempt them from appropriation under state law is not denied, and could not be"; and that in *Cali-*

fornia Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U. S. 142, 158, the Court held that the Desert Land Law of March 3, 1877, "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself" and that (p. 162) "as the owner of the public domain, the Government possessed the power to dispose of the land and water thereon together, or to dispose of them separately." Those holdings can only be predicated on the concept of effective ownership by the United States.

We have gone to some length to meet this basic argument heretofore advanced by the states because we do not wish to stand alone on a point of pleading without demonstrating the substantive correctness of the position taken. Actually, the issue is foreclosed to the states by their pleadings in which each, in its answer to paragraph 3 of the Government's Petition of Intervention admits the original *ownership* by the United States of "all rights in waters" in the North Platte and Platte basins, Nebraska alleging, however, that the United States held those rights in trust for future users, a qualification otherwise shown to be unsound.

4. The claim of Government ownership has been upheld in the only courts in which it has been asserted by the United States in connection with project water; Kansas *v.* Colorado *and* Wyoming *v.* Colorado, *distinguished.*

Careful search has brought to light only three cases in which the courts were presented with the same over-all problem presented in the United

States' first cause of action. In none of the cases heretofore discussed was the United States a party contending for its ownership and control of reclamation project water, unless it be in *Ide* v. *United States* and the related "return flow" cases. Although these involved slightly different ultimate problems they nevertheless constitute authorities directly applicable here.

The three cases are *United States* v. *Orr Water Ditch Company,* in the Federal District Court for the District of Nevada, and two adjudication proceedings in the State District Court for the Seventh Judicial District of Colorado. The decisions in all of these three cases are unpublished. In two of the cases the decision was in favor of the contention of the United States; in one, it was not.

In the Nevada Federal District Court case a Master had been appointed. His report to the Court contained a complete consideration of the question of ownership of the unappropriated and non-navigable water which was involved in the proceeding. His conclusions were in favor of the claim of the United States and his recommended decree was likewise in favor of the United States. There are reproduced, as Appendix III to this brief, a certified copy of the pertinent portions of the Master's report and also certified copies of the pertinent portions of the Court's preliminary and final decrees.[46]

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[46] The originally certified copies have been deposited with the Clerk.

The two Colorado District Court adjudications involve, among others, the rights for the Grand Valley and for the Uncompahgre projects of the Bureau of Reclamation.[47] The first of the two projects to come before the Court was the Grand Valley project. The priority date recommended by the referee and accepted by the Court in that case is inconsistent with the contention made there by the United States as to the ownership and reservation of water. The United States appealed in that instance to the Supreme Court of Colorado and again vigorously argued its ownership and reservation of the water for the project. In the case entitled *United States* v. *Palisade Irrigation District, et al.*, 60 Colo. 214 (1915), the Supreme Court of Colorado dismissed the appeal on motion of the appellees on the sole ground that the decree of the District Court was interlocutory in nature and not reviewable. Counsel have been unable to find that there are any subsequent proceedings in this case.

The rights of the Uncompahgre project were presented for adjudication in the same State District Court. Again the theory of Government ownership and reservation of water for the proj-

[47] It is to be borne in mind that under the Colorado system the State District Courts are the agencies which adjudicate water rights and establish official state recognition for such rights. Their decisions serve substantially the same function as decisions of state administrative officials on water right applications in Wyoming and Nebraska.

ect was presented. In this instance the referee submitted a report which, although it did not contain a discussion of legal theories, contained a finding that "the United States on to wit Jan. 31st, 1902, reserved from further appropriation and set aside for Governmental, reclamation and irrigation purposes, such an amount of the then unappropriated waters of the Gunnison and Uncompahgre Rivers and their tributaries, as would be sufficient and necessary for the reclamation and proper irrigation of the lands embraced within said Project and to be reclaimed and irrigated thereby." Approximately one year after his action on the Grand Valley Project application, the same District judge adopted the referee's report relating to the Uncompahgre Valley Project and entered a decree in accordance therewith in which he stated that the priority of the Uncompahgre Valley Project was based upon several factors including "the assertion and claim of the United States of its right to the use of the unappropriated waters of the Gunnison River and its tributaries." Certified copies of the pertinent portions of the referee's report and the decree of the District Court in this case are reproduced in Appendix IV to this brief.[48]

It is submitted that the action of the Colorado District Court in the Uncompahgre Project mat-

[48] The originally certified copies have been deposited with the Clerk.

ter overrules any implication in the action taken one year earlier by that same court in not granting to the United States a priority date for the Grand Valley Project consonant with the theory of Government ownership and reservation of water. It is further submitted that this action of the Colorado District Court and the action of the Federal District Court for Nevada in the *Orr Water Ditch Company* case are the only authorities directly in point on the Government's claim of ownership of the unappropriated water and of resultant ownership of water reserved by it for its reclamation projects.

Neither *Kansas* v. *Colorado*, 206 U. S. 46, nor *Wyoming* v. *Colorado*, 259 U. S. 419, is pertinent, although they have been urged heretofore in this proceeding as instances in which this Court rejected the claim of Government ownership or control.

In *Kansas* v. *Colorado* the United States intervened and argued that, because Kansas relied on the riparian doctrine whereas Colorado relied on the conflicting doctrine of prior appropriation, and because neither State was competent to regulate the use of water outside of its own borders, the entire power of regulation must be held to reside in the United States. Such a Federal power was said to be necessary also to secure the reclamation of arid lands—not lands of the United States alone, but arid lands generally. The whole claim made by the United States rested on an

asserted inherent power of sovereignty, a type of national police power springing from the inability of the two States, with conflicting policies, to deal with the interstate situation. The Court rejected that argument, and directed dismissal of the Government's Petition of Intervention, because of the fact that the Federal Government is one of enumerated powers, any sovereign powers not delegated and not exercisable by the states being reserved to the people by the Tenth Amendment. The opinion, as it must, concedes the power of the United States, acting through the Congress, to control the arid lands of the public domain. The decision actually deals only with the political powers of the United States in non-navigable water [49] and, in fact, the United States there claimed no proprietary rights in the water of the Arkansas.

One statement made in *Kansas* v. *Colorado* might be taken to indicate that the states are invested with ownership and control over all water. That is the statement that each state is free to choose for itself between the doctrine of riparian rights and that of appropriation; and that the United States cannot force either doctrine on a state (206 U. S. 94). That statement was made in heavy reliance on authorities dealing with navigable water. If it can be read as appli-

[49] In this connection see 1 Wiel on Water Rights (3d Ed.) pp. 218, 219, and 1 Kinney on Irrigation (2d Ed.) pp. 633, 692.

cable to non-navigable water, it is entirely unsupported in so far as it may apply to such water owned by the United States in western states and it has not been followed in later decisions already discussed. The statement was, however, quoted with approval in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 164. But that latter case decided that "As the owner of the public domain, the Government possessed the power to dispose of land and water thereon together, or to dispose of them separately" (295 U. S. 162). It is not perceived how the assertion that the United States could not impose on a state either the doctrine of riparian rights or that of appropriation can stand beside this statement, *unless* the former assertion be regarded as limited to navigable water or to particular non-navigable water title to which had passed from the United States. But, in any event, as has already been pointed out, the Court in *Kansas* v. *Colorado*, was not considering the proprietary rights of the United States and, in the *California Oregon* case (to which the Government was not a party), the Court also recognized the limitation stated in *United States* v. *Rio Grande Dam & Irrig. Co.*, *supra*, that the power of the states to select their own system of water law was subject to the limitation that, in the absence of action by Congress, the states cannot destroy the rights in water held by the United States as owner of land bordering

on the stream."[20] Actually, the power of the Federal Government to control its property in the western states is also acknowledged in *Kansas* v. *Colorado*. In this connection see *Burley* v. *United States*, 179 Fed. 1, 8–9 (C. C. A. 9).

In the subsequent case of *Wyoming* v. *Colorado*, 259 U. S. 419, the Court specifically reserved the question whether the United States could, by reason of its public land holdings, impose the doctrine of riparian rights or that of appropriation on the western states. In that case the United States was not a party and could not have been bound by any decree entered. It had, however, appeared as a friend of the Court and had filed a brief at the suggestion of the Court. In that brief the United States had asserted proprietary rights in the unappropriated water of the Laramie River. But it had not claimed any actual reservation or use of that water or any need for the use of that water. Moreover, the decision of the Court found no unappropriated water. In those circumstances, the Court found no necessity to consider the Government's claim, it not being a party, in settlement of the dispute which was submitted. Apropos of the point here under consideration the Court said (259 U. S. 465):

> Nor is the United States seeking to impose a policy of its choosing on either state,

[20] This need not be limited to lands bordering the stream. See *Atchison* v. *Peterson*, 20 Wall. 507, 512.

> All that it has done has been to recognize and give its sanction to the policy which each has adopted. Whether its public land holdings would enable it to go further we need not consider.

While the United States has, for the most part, left to the states the choice between riparian rights and appropriation, especially in the west, it has not always done so. The Act of June 11, 1906, 34 Stat. 233, 234, provides that patents of lands in the Black Hills Forest Reserve shall not vest riparian rights in the patentees and that the waters of that reserve shall remain open to appropriation.[51] Many years before, Congress provided that patents of lands in the Northwest Territory should carry riparian rights in non-navigable streams. Act of May 18, 1796, c. 29, 1 Stat. 464, 468.[52] The Supreme Court has always assumed without question that that provision was valid and controlling. See *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 288–289; *Hardin* v. *Shedd,* 190 U. S. 508, 519; *Scott* v. *Lattig,* 227 U. S. 229, 242.

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[51] In 1877 the legislature of California had petitioned Congress to enact such a provision for the public domain generally. Cal. Stats. 1877, p. 1070.

[52] This provision is carried over into R. S. § 2476 and there stated without the limitation to the region formerly comprising the Northwest Territory.

5. The claim of Government ownership and control does not and its recognition in this decree will not affect private rights or their proper recognition and protection by the litigant States, nor will it injuriously affect the interests of the States among themselves

Recognition of the rights of the United States to the water reserved or taken for the North Platte and Kendrick projects, in the manner indicated by United States' exceptions I, V, X, XIII and XVII, will in no way interfere with the full exercise of private rights. Appropriative rights now existing are not affected, nor is the control over and the protection of the exercise of those rights by proper state authority. The right of qualified persons to make future appropriations of any water unappropriated and unreserved for project uses, within the limits of the Special Master's proposal for decree, remains unchanged.

Likewise recognition of the rights of the United States interjects no complications among the States themselves. The apportionment of water merely goes four ways instead of three. The exercise of the rights of the United States will be controlled by the decree just as is the exercise of the rights of the States. The limitations on individual canal and reservoir operations will be the same whether the United States or a State controls them.

The United States will, however, if its rights be recognized, have the power to control the dis-

position of its storage water and the delivery of the storage and natural flow water allocated to it, thereby being enabled to perform the contractual obligations which it has assumed to the water users and, at the same time, to protect its investment and its property as contemplated by the reclamation laws. All these things are jeopardized otherwise, as is readily apparent from a consideration of the materials collected in Appendix II. Also, recognition of the rights of the United States will remove the anomaly, which otherwise will exist under this decree, of a unified project in two States, each of which otherwise does and will apply different policies of administration and control.

C. *If it be Assumed, as in the United States' Second Cause of Action, That the United States Does Not Own Unappropriated, Nonnavigable Water, or all Rights in Such Water, it Still Follows That the United States Owns the Basic Rights in Project Water by Appropriation and Remains Entitled to a Decree Recognizing That Ownership and the Attendant Right of Control, as Well as to an Apportionment to it of Project Water*

Under the second cause of action the United States claims ownership and control of project water as an appropriator. Relief under this cause of action can follow only if it be denied under the first cause of action, since the claim

of ownership of unappropriated water in the first cause of action places the relief sought there on a widely variant legal basis, as has been already shown.

Nevertheless if, under this cause of action, it is determined that the United States, as an appropriator, secures a property right in the water appropriated, the constitutional power of Congress to the exclusive control of that property right attaches. The Reclamation Act and its supplements determine and control the use of the project water in precisely the way they were shown to do under the first cause of action. And the right of the United States to apportionment of project water to it is identical with and attended by identical incidents as that in the first cause of action. Once the property right is found to exist in the United States, no state can stand in judgment for the United States as to that property right for the related reasons, already discussed in connection with the first cause of action, that a state cannot act as *parens patriae* to the United States and that, when a Federal property right exists, the control over that right is exclusively in Congress and beyond the power of any state to affect. The latter concept divorces the states from any control over these water rights of the type which they have over private water rights in the exercise of their police power, and which possibly might otherwise support the states' power

to represent those private rights in litigation such as this.[53]

1. The United States has complied fully with all requirements for the creation of a valid appropriation of project water

As has already been shown, the United States made appropriate filings under state law for water for its projects and those filings were accepted by the appropriate state officials as proper and adequate. Those filings have since been fully adjudicated pursuant to state law. The fact that the adjudications in form run to the water users rather than to the United States is subject to the same analysis here as it was in the first cause of action, the primary point of significance being that those adjudications were, in effect, subject to the rights of the United States.

2. Federal legislation evidences the intent of Congress that the United States hold the title to and exercise control over the water rights for reclamation projects

Section 8 of the Reclamation Act, heretofore discussed, and the various Federal statutes set out in Appendix II of this brief, show conclusively the intent by Congress that the United States hold title to the water rights for reclamation projects. By the same token they also clearly constitute an actual and detailed exercise of control over those rights. Without a proprietary

[53] See the authorities at page 77, *supra*.

interest in the water, and the power of control over it which accompanies such an interest, the Congress and the Secretary of the Interior would be powerless to do those things contemplated by the statutes. The Secretary of the Interior cannot sell, lease or rent that which the United States does not own; yet he is directed to sell, lease or rent water in several of the statutes involved. Neither can he control the use, application and distribution of water in the manner provided by other of those statutes, which has been shown to be frequently contrary to the method provided by state law, unless there be ownership and attendant control in the United States.

One additional statute may be mentioned as exemplary of the Congressional approach to such matters. Section 2 of the Act of August 26, 1937, c. 832, 50 Stat. 850, deals with appropriations for and construction of the Central Valley Project in California and specifically authorizes the Secretary of the Interior to "acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-ways, water rights and other property necessary for said purposes." This grant of the power to condemn water rights presupposes, of course, use of those water rights for a Governmental purpose. But, more than that, it contemplates also the taking of prior rights, for compensation to be sure, for the benefit of the project which may cover both senior and junior lands. Such a

provision is founded on no principle of state water law and certainly is founded upon no concept of ownership and control of the water by anyone other than the United States.

3. Legislation of Nebraska, Wyoming and Colorado recognizes and sanctions the acquisition or holding of the proprietary right in project water by the United States as contemplated by the federal statutes

If the States of Nebraska and Wyoming recognize and sanction acquisition by the United States of the proprietary right contemplated by the Congressional acts, it is manifest that the United States, even by appropriation pursuant to state law, acquires ownership of the water rights of its projects under the filings which have been made. It is submitted that the legislation of those States, and also of Colorado, clearly does recognize and sanction that acquisition by the United States of rights in its project water.

Sec. 46-628, Nebr. Comp. Stats. (1929) makes the following provision with reference to appropriation and sale of water by the United States:

> The United States of America is hereby authorized, in conformity to the laws of the State of Nebraska, to appropriate, develop and store any unappropriated, flood or unused water, in connection with any project constructed by the United States pursuant to the provisions of an act of Congress approved June 17, 1902, being an act providing for the reclamation of arid lands

(32 Stat. L. 388), and all acts amendatory thereof and supplemental thereto. When the officers of the United States reclamation service shall determine that any water so developed, or stored is in excess of the needs of the project as then completed, or is flood or unused water, the United States may contract to rent or sell such developed, stored, flood or unused water, under the terms and conditions imposed by act of Congress and the rules and regulations of the United States, * * *. A certified copy of all such contracts for the sale or rental of water by the United States as herein provided shall immediately upon their execution be furnished to the department; and the water superintendent and water commissioner of the district shall be notified of the time when such water shall be delivered.

The first sentence of this statute clearly authorizes the United States to appropriate, develop and store any unappropriated water in the State of Nebraska. The requirement that those acts be done in conformity to the laws of the State of Nebraska clearly is not a limitation upon the right of the United States to do all of those things provided for in the Reclamation Act and its amendments and supplements or to acquire whatever rights are contemplated by those enactments of Congress, since the authority to appropriate, develop and store water is expressly granted in

connection with any project constructed pursuant to the reclamation laws. The following provisions of the statute recognize the right of the United States to rent or sell water developed or stored in excess of the needs of the project. It is also significant that the statute recognizes the right of the United States to sell or rent "flood or unused waters" of the streams of the state. Certainly the United States could not sell or rent either project waters or flood or unused waters unless it were the owner of them. This statute might well be urged as a recognition by the State of Nebraska of the claim of the United States to the initial and continued ownership of all unappropriated water. Certainly, at least, it is a recognition of the ownership of the United States of such water as it may appropriate in conformity with state law, and of the right of the United States to deal with that water as provided in the reclamation laws and "the regulations of the United States."

Various other Nebraska statutes also disclose consent by the Nebraska legislature to acquisition by the United States of title to project water rights and manifest a state policy to give full scope to the operations of the Federal Government under the provisions of the reclamation laws and proper administrative regulations pursuant to those laws. Nebr. Comp. Stats. (1929), secs. 46–110, 46–197, 46–201, 46–207.

In Wyoming the statutory situation is much the same. Sec. 122–713, Wyo. Rev. Stats. (1931) relates to the duties and powers of the board of commissioners of an irrigation district and provides:

> * * * and the board may contract with the United States for the construction, operation and maintenance of the necessary works for the delivery and distribution of water therefrom under the provisions of the federal reclamation act, and all acts amendatory thereof and supplementary thereto and the rules and regulations established thereunder, or for the assumption, as principal or guarantor of the indebtedness to the United States on account of district lands. The board may contract with the United States for a water supply under any act of Congress providing for or permitting such contract * * *.

The provision that the board may contract with the United States for a water right under any act of Congress appears to be a clear recognition of the right of Congress to dispose of project water and, as has already been pointed out, there are acts of Congress providing for sale and rental, on both permanent and temporary bases, of water. This Wyoming statute, then, necessarily recognizes the proprietary right of the United States in project water.

Sec. 122–723, Wyo. Rev. Stats. (1931) deals with the assessment of the cost of constructing

works against district lands and provides further that:

> * * * it shall be competent for the court, in case a contract is made between the United States of America and an irrigation district for the construction *or sale* of irrigation works and *water rights*, to order the charges to be paid in accordance with the provisions of an act of Congress approved December 5, 1924. [Emphasis added.]

This provision clearly contemplates the possibility of sale of water rights by the United States, a situation which could not exist if the United States did not have proprietary interest in project water.

In Colorado, again, the statutory situation is similar. Sec. 90–444, Colo. Stats. Ann. (1935) makes the following provision with reference to the power of the board of directors of an irrigation district to enter into contracts with the United States.

> Said board may also enter into any obligation or contract with the United States for the construction, or operation and maintenance of the necessary works for the delivery and distribution of water therefrom; or for drainage of district lands, or for the assumption, as principal or guarantor of indebtedness to the United States on account of district lands, or for the temporary rental of water under the provision of the federal reclamation act and

> all acts amendatory thereof or supplementary thereto, and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any act of Congress providing for or permitting such contract, and may convey to the United States as partial or full consideration therefor water rights or other property of the district; * * *.

It is to be noted that this statute specifically authorizes temporary rental of water from the United States as well as a permanent contract for water supply from the United States under any acts of Congress and also that an irrigation district may convey its water rights to the United States. Not only is the entire scheme of the Federal reclamation law, including its ownership and control of water features, accepted by the State of Colorado, but it is even specifically provided that water rights may be conveyed to the United States by irrigation districts. That latter provision clearly manifests the consent of the State of Colorado to the acquisition of rights in water by the United States. And so, too, Secs. 90–500 to 90–505, Colo. Stats. Ann. (1935) set up a procedure for sale by irrigation districts of irrigation works, franchises, water rights and other property. Sec. 90–504 expressly recognizes that the United States may purchase those water rights but stipulates that:

> No sale of water rights [to the United States] shall in any manner impair or be

> deemed to relinquish any of the sovereign rights of the State of Colorado in the waters of the state or to control and regulate the diversion, use and distribution thereof.

In so far as this statute may be interpreted as attempting to subject the property rights acquired by the United States to state police jurisdiction it is, of course, wholly ineffective.[34]

No cases have been found in any of the three States pertinent to the effect of these statutes in recognizing proprietary rights in the United States,[35] but the statutes speak for themselves on that matter. The United States Circuit Court of Appeals for the Ninth Circuit, however, has had occasion to consider a Nevada statute, substantially similar to the primary Wyoming and Colorado statutes stated above, in a case in which the United States asserted its rights to project water. The court concluded that, "We think that statute authorizes conveyance to, and ownership by, appellant [the United States] of the water rights in question, regardless of whether it does or does not own land to be irrigated." *United States* v.

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[34] *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288. The general principles applicable here have previously been discussed.

[35] Two Nebraska cases are obliquely pertinent but not determinative. *Livanis* v. *Northport Irrigation District*, 121 Nebr. 777 (1931); *State* v. *Gering and Ft. Laramie Irr. Dist.*, 129 Nebr. 48 (1935).

Humboldt Lovelock Irr., Light & Power Co., 97 F. 2d 38, 45, certiorari denied, 305 U. S. 630."

Pertinent, also, is *San Joaquin & Kings River, etc., Co.* v. *County of Stanislaus*, 233 U. S. 454, 461, in which this Court found that an irrigation company was entitled to have the value of its water rights included in a publicly determined rate base, for the reason that a California statute recognizing the company's right to sell water (in this regard similar to statutes of the various states mentioned above and relating to the United States) certainly did not contemplate that there would be nothing to sell.

In view of these various statutory provisions it is submitted that the States of Nebraska, Wyoming and Colorado each have assented to operation by the United States within that State under the provisions of the Reclamation Act and the various acts amendatory and supplemental to it, which fact itself necessarily carries with it acceptance by those States of the ownership and control of waters on Federal reclamation projects as contemplated by the acts of Congress. Furthermore, it is submitted that by these various state enactments each of the States recognized specifically

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" It is entirely immaterial that in that case the United States procured the rights by conveyance rather than original appropriation. The rights are the same in either event, as is the recognition by the state of the right of Federal ownership.

the proprietary right of the United States in the water which it acquires for its reclamation projects.

4. A private company or an irrigation district, and therefore certainly the United States, is recognized by state law as having the basic proprietary right in the water which it appropriates for the use of others

Even without regard to the state legislation pertinent directly to the United States, as just discussed and which we submit to be conclusive in this instance, it seems apparent that the United States would be recognized as having a proprietary right in project water in any event. Its position in that regard certainly can be no less than that of an irrigation company or district under state law. Leaving out of account the state statutes specifically recognizing the rights of the United States, the analogy between its position and that of the private company or irrigation district is precise *except* for the fact that the United States has a sovereign capacity which may attach to its functions certain incidents not attached to the functions of a private company. *Cf. Mower* v. *Bond*, 8 F. 2d 518 (S. D. Idaho); *Burley* v. *United States*, 179 Fed. 1 (C. C. A. 9); *Bailey* v. *Tintinger*, 45 Mont. 154 (1912). None of those incidents can, however, operate to make the position of the United States any less than that of a private company or district or to make its ownership or control of water any less than theirs.

An examination of the authorities indicates that even an irrigation company or district is recognized by the western irrigation states as having a proprietary interest in the appropriation of water made by it for the irrigation of lands which it serves."[a] Before going into a discussion of the decisions, however, it may be well to define the problem more closely. In most of the cases dealing with the rights of an irrigation company or district, the question is one between the company or district on the one hand and the water users on the other—although that is not always the situation. The exact relationship between a company or district and water user is, in each instance, dependent on a number of varying things, *e. g.*, state statutes and terms of contracts. The present problem is not concerned directly with the details of that relationship as so defined, but rather with the more fundamental problem that the company or district is recognized as the owner of water rights and, as such, entitled to exercise control and dominion over those rights. If the company or district be recognized as the basic owner of the appropriative right in water, then the question is as to what state law and what contracts govern in the regulation of the use of that right and in the relationship between the

[a] Mutual irrigation companies are on a different theoretical footing and the authorities relating to them are not included here unless specifically so designated.

company or district and its water users. It is the position of the United States that, where the United States is in the position of the company or district on Federal reclamation projects, the laws of Congress govern since the appropriative right becomes the property of the United States subject to disposition under Art. IV, Sec. 3, cl. 2, of the Constitution free from the regulatory police powers of the states except to any extent that state legislation may have been adopted by Congress as applicable.

At the outset, reference may be made to the fact that it appears to be universally held that individual water users are not necessary parties in litigation involving water rights of irrigation companies or districts. *Montezuma Canal Co.* v. *Smithville Canal Co.*, 218 U. S. 371; *Arroyo Ditch & Water Co.* v. *Baldwin*, 155 Cal. 280 (1909); *Farmers' Independent Ditch Co.* v. *Agricultural Ditch Co.*, 22 Colo. 513 (1896); *Randall* v. *Rocky Ford Ditch Co.*, 29 Colo. 430 (1902); *Sterling* v. *Pawnee Ditch Extension Co.*, 42 Colo. 421 (1908); *Farmers' Co-op. Ditch Co.* v. *Riverside Irrig. Dist.*, 14 Idaho 450 (1908); *Nampa & Meridian Irrig. Dist.* v. *Barclay*, 56 Idaho 13 (1935); *Oregon Construction Co.* v. *Allen Ditch Co.*, 41 Ore. 209 (1902); *Thorpe* v. *Tenem Ditch Co.*, 1 Wash. 566 (1889). In arriving at this conclusion, in *Nampa & Meridian Irrig. Dist.* v. *Barclay*, *supra*,

the Supreme Court of Idaho said (56 Idaho 18-19):

> The issue with which we are here confronted is founded on an erroneous theory which has been advanced from time to time by counsel for some of the ditch and irrigation companies and water users, to the effect that a water user who has acquired his right through "sale, rental or distribution" from a ditch or canal company or an irrigation or drainage district, acquires the rights of an appropriator of the water and is entitled to the same consideration in all litigation involving the original appropriation to which the canal or ditch company or irrigation or drainage district is entitled. Such is not the law and it has never been so held or recognized in this state. * * * The consumers possess no water right which they can assert as against any other appropriator; their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. *Yaden* v. *Gem Irr. Dist.*, 37 Idaho, 300, 216 P. 250. One who acquires the right to use water from an appropriator, whose right was initiated by appropriation under section 1, art. 15, "for sale, rental or distribution," is not the owner of the appropriation and does not acquire the rights of an appropriator, but he simply acquires

the rights of a user and consumer, as distributee of the water under sections 4 and 5, art. 15, of the Constitution.

Some of the decisions just cited use language of trusteeship and also rely upon the impracticability of joining all water users under a particular canal in litigation over the water rights of that canal. Irrespective of what terminology may be used it seems clear that the action of the courts recognizes the company or district as having a cognizable legal right in the water.

In many instances courts of the irrigation states have specifically held or clearly recognized tha irrigation companies and districts own the appropriations made by them and the water rights acquired pursuant to the appropriations. *Consolidated People's Ditch Co.* v. *Foothill Ditch Co.*, 205 Cal. 54 (1928); *Nampa & Meridian Irrig. District* v. *Barclay*, 56 Idaho 13 (1935); *Farmers' Co-op. Ditch Co.* v. *Riverside Irrigation Dist.*, 14 Idaho 450 (1908); *Murray* v. *Public Utilities Comm.*, 27 Idaho 603 (1915); *Bailey* v. *Tintinger*, 45 Mont. 154 (1912); *Brennan* v. *Jones*, 101 Mont. 550 (1936); *Sherlock* v. *Greaves*, 106 Mont. 206 (1938); *Albuquerque Land & Irrig. Co.* v. *Gutierrez*, 10 N. M. 177 (1900), aff'd, 188 U. S. 545; *Hagerman Irrig. Co.* v. *McMurry*, 16 N. M. 172 (1911); *Nevada Ditch Co.* v. *Bennett*, 30 Ore. 59 (1896); *In re Waters of Walla Walla River*, 141 Ore. 492 (1933); *Willis* v. *Neches Canal Co.*, 16 S. W. 2d 266 (Comm. App., Tex. 1929); *Sowards*

v. *Meagher*, 37 Utah 212 (1910); *Cf. Syrett* v. *Tropic & East Fork Irrig. Co.*, 97 Utah 56 (1939)."

A few quotations from the cases just cited will serve to illustrate the nature and basis of the decisions. In *Consolidated People's Ditch Co.* v. *Foothill Ditch Co.*, 205 Cal. 54, 63 (1928), the court said:

> The capital stock of the foregoing corporations is transferable in the ordinary manner provided by law, and the owners thereof are the equitable owners of that proportion of the properties of each of such corporations which their respective number of the shares of stock thereof bear to the entire subscribed capital stock of the corporation, and as such equitable owners of the properties of the corporation are also equitably entitled to the proportionate

[51] In only three jurisdictions does it appear to have been announced expressly that irrigation companies or districts do not have a proprietary right in the appropriation or the waters appropriated. See *Slosser* v. *Salt River Valley Canal Co.*, 7 Ariz. 376 (1901); *Wheeler* v. *Northern Colo. Irrig. Co.*, 10 Colo. 582 (1888); *Wyatt* v. *Larimer & Weld Irrig. Co.*, 18 Colo. 298 (1893); *Farmers' Canal Co.* v. *Frank*, 72 Nebr. 136 (1904); *Enterprise Irrig. Dist.* v. *Tri-State Land Co.*, 92 Nebr. 121 (1912). It is submitted that in these jurisdictions mere lip service is paid to the principle enunciated. The Colorado and Nebraska cases will be discussed *infra* in connection with the decisions of the three states involved in this litigation. As to Arizona it may be said that her court has recognized the right of an appropriator, not a user of water, to convey away rights in the use of water appropriated by it. *City of Phoenix* v. *State*, 53 Ariz. 28 (1938).

distribution of such waters as such corporation acquires by appropriation or otherwise for the various uses for which such waters are acquired. Such stockholders are in that sense and to that extent, but to none other, owners of the water and water rights which the corporation possesses and over the distribution of which it exercises under general laws and under its particular by-laws full and exclusive control.

The Supreme Court of Montana in *Bailey* v. *Tintinger*, 45 Mont. 154, 177 (1912), stated:

> To deny the right of a public service corporation to make an appropriation independently of its present or future customers, and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localities where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and purpose of the United States in its great reclamation projects, for the United States must proceed in making appropriations of water (from the nonnavigable streams of this state at least) as a corporation or individual. Section 4846, Rev. Codes; *United States* v. *Burley* (C. C.) 172 Fed. 615; *Burley* v. *United States*, 179 Fed. 1; 102 C. C. A. 429.
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> It is clearly the public policy of this state to encourage these public service cor-

porations in their irrigation enterprises, and the courts should be reluctant to reach a conclusion which would militate against that policy.

The Supreme Court of Oregon made the following statement in *In re Waters of Walla Walla River*, 141 Ore. 492, 497–498 (1933):

> When a public corporation complies with all of the provisions of this statute, [Oregon Code 1930, § 47–1001] it, and not the owner of the land supplied acquires the right to the use of the water. *Nevada Ditch Co.* v. *Bennett*, 30 Or. 60, 45 P. 472, 60 Am. St. Rep. 777; *In re Waters of Hood River*, 114 Or. 112, 227 P. 1065; *In re Waters of Umatilla River*, 88 Or. 376, 168 P. 922, 172 P. 97; 1 Wiel on Waters in Western States (3d Ed.) 431; 3 Kinney on Irrigation and Water Rights (2d Ed.) § 1477.
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> There is a distinction between a corporation organized for profit for the purpose of supplying water to all persons whose lands lie within reach of its ditch, for general rental, and a mutual corporation organized for the purpose of carrying the water appropriated by its mutual stockholders. The former corporation becomes the owner of the use of the water appropriated and the irrigator becomes its agent to apply the water supplied to a beneficial use. The latter corporation is simply the agent of

> the appropriator to carry his water to where he makes the beneficial use. 3 Kinney on Irrigation and Water Rights (2d Ed.) § 1477.

The references to Wiel and Kinney in this quotation are appropriate.

It has been frequently said by western courts that the individual water user dependent upon the facilities of an irrigation company or district has a mere right to receive service from the company or district. In some circumstances it has been said that that is a right to service analogous to that which an ordinary consumer has as against any public utility. *Babcock* v. *C. W. Clarke Co.*, 213 Cal. 389 (1931); *Miller* v. *Railroad Commission*, 9 Cal. 2d 190 (1937); *Nampa and Meridian Irrig. Dist.* v. *Barclay*, 56 Idaho 13 (1935); Cf.: *Dundy County Irrig. Co.* v. *Morris*, 107 Nebr. 64 (1921); *Willis* v. *Neches Canal Co.*, 16 S. W. 2d 266 (Comm. App. Tex. 1929); *Edinburg Irrig. Co.* v. *Ledbetter*, 286 S. W. 185 (Comm. App. Tex., 1926). Frequently this right to service has been considered merely as a contract right flowing from the contractual relationship between the company or district and the water user. *Ackroyd* v. *Winston Bros. Co.*, 113 F. 2d 657 (C. C. A. 9);[*] *City and County of Denver* v. *Brown*, 56 Colo. 216 (1913); *People* v. *District Court*, 63 Colo. 511 (1917); *In re Waters of Walla Walla*

[*] The *Ackroyd* case involves a mutual company. On this point it is even stronger authority because of that fact.

River, 141 Ore. 492 (1933); *Wenatchee Reclamation District* v. *Titchenal*, 175 Wash. 398 (1933); *Shafford* v. *White Bluffs Co.*, 63 Wash. 10 (1911); Cf.: *State* v. *District Court*, 102 Mont. 533 (1936); *Combs* v. *United Irrig. Co.*, 110 S. W. 2d 1157 (Ct. Civ. App., Tex., 1937); *Chapman* v. *American Rio Grande Land & Irrig. Co.*, 271 S. W. 393 (Ct. Civ. App., Tex., 1925).

It has also been held that a water user cannot for himself change the place of diversion of water which he receives from an irrigation company, even though the water user is itself an irrigation district which has purchased stock in the company. *Consolidated People's Ditch Co.* v. *Foothill Ditch Co.*, 205 Cal. 54 (1928). *Cf. In re Waters of Walla Walla River*, 141 Ore. 492 (1933). And it has also been held that the water user cannot make use of the water on land not within the service area of the company or district or not within the statutory authorization to serve of the company or district. *Jenison* v. *Redfield*, 149 Cal. 500 (1906); *Wright* v. *Platte Valley Irrig. Co.*, 27 Colo. 322 (1900); *Model Land & Irrig. Co.* v. *Madsen*, 87 Colo. 166 (1930).[*] *Cf.*: *Costilla Ditch Co.* v. *Excelsior Ditch Co.*, 100 Colo. 433 (1937). Under decisions such as these it is obvious, irrespective of the language which

[*] The *Model Land Co.* case involves a mutual company, but, by reason of that fact, is even a stronger authority on the point here involved.

may be used, that the individual water user does not have the proprietary interest in the water rights, but does have some lesser and subsidiary interest which is defined by the legal status or the contracts of the irrigation company or district. It is submitted that the conclusion is inescapable that the proprietary rights rest with the company or district.

This conclusion is supported by decisions which recognize the right of the company or district as a valid water right subject to recognition prior to the time that the water may have been put to use by individual water users. *Bailey* v. *Tintinger,* 45 Mont. 154 (1912); *Albuquerque Land & Irrig. Co.* v. *Gutierrez,* 10 N. M. 177 (1900); *Wyoming Central Irrig. Co.* v. *Farlow,* 19 Wyo. 68 (1911); *Lakeview Canal Co.* v. *R. Hardesty Mfg. Co.,* 31 Wyo. 182 (1924). *Cf. Enterprise Irrig. Dist.* v. *Tri-State Land Co.,* 92 Nebr. 121 (1912). Similar support also arises from decisions that no preference in the priority dates can exist as among users under one canal. *Willis* v. *Neches Canal Co.,* 16 S. W. 2d 266 (Comm. App. Tex., 1929); *Edinburg Irrig. Co.* v. *Ledbetter,* 286 S. W. 185 (Comm. App. Tex., 1926). *Cf. Vonburg* v. *Farmers' Irrig. Dist.,* 132 Nebr. 12 (1937).

In Wyoming, the situs of the Government's reservoirs and principal diversions for both the North Platte and Kendrick projects, it seems clear that an irrigation company or district has a property right in the water appropriated by it.

In *Wyoming Central Irr. Co.* v. *Farlow*, 19 Wyo. 68 (1911), it was held that canal properties were taxable in the hands of the company and had not become appurtenant to the lands to be irrigated where the company still held water rights to be sold to anticipated water users. Similarly, in *Lakeview Canal Co.* v. *R. Hardesty Mfg. Co.*, 31 Wyo. 182 (1924), it was held that a mechanic's lien could attach to water rights acquired by a corporation constructing an irrigation project under the provisions of the Carey Act, the court saying, among other things, "While the construction company in this case can not, perhaps, be said to be the owner of the water right to the full extent that a person who has the legal title to real property is said to be the owner thereof, yet it has the sole and exclusive right to sell it, and, if any party can be said to be the holder of the legal title to such water right, that must necessarily be the construction company, before it disposes thereof." In *Scherck* v. *Nichols*, 55 Wyo. 4 (1939), the court specifically acknowledged that a reservoir owner need not own land to be irrigated and "may sell, lease, transfer, and use such [storage] water in such manner and upon such lands as the owner may desire", after which the court held that a natural flow appropriation could also be validly made by and a water right inure in a person who does not own the land designated to be irrigated and who, himself does not use the water. And in *State* v. *Laramie*

Rivers Co., 59 Wyo. 9 (1943), the court seems to hold that an irrigation company could make a valid natural flow appropriation even though it owned no land to be irrigated. That latter case involved appropriations made under territorial legislation; but no real significance for present purposes can attach to that fact in view of the *Scherck* case which involved appropriations under the modern state statutes.

It is submitted that these Wyoming cases are conclusive on the present issue. The owner of a reservoir owns and controls the disposition of reservoir water beyond any doubt, and a company or person can acquire an appropriative right in natural flow even though it or he does not have land on which to put it to use and therefore is not the ultimate user. And Wyoming statutes specifically recognize such rights in irrigation districts also. Wyo. Rev. Stats. (1931), Secs. 122–710, 122–713; 1940 Supp., Wyo. Rev. Stats., Secs. 122–1907, 122–1912. With the United States in the position of the reservoir owner and the natural flow appropriator, it acquires ownership of the water rights, subject to the control and disposition thereof pursuant to Congressional enactments thereafter rather than subject to the plenary control of state law.

In Nebraska the situation is not so clear-cut, but it is submitted that a fair interpretation of the cases leads to the same conclusion as found in the instance of Wyoming.

On several occasions the Nebraska Supreme Court has made the statement that an irrigation company does not own the water which it diverts or carries. *Farmers' Canal Co.* v. *Frank*, 72 Nebr. 136, 156 (1904); *Enterprise Irr. Dist.* v. *Tri-State Land Co.*, 92 Nebr. 121, 137–138 (1912). Those statements, however, appear to be dicta and are not representative of the actual holding of the Nebraska court in those and other cases. In the first of those two cases the court merely held that a collateral attack could not be made against the adjudication of a right under the appropriate statutory procedure, in the course of its discussion the court remarking that an irrigation company does not own the water carried by it, but acknowledging that the law grants valuable rights (undefined) to such companies. In the *Enterprise* case the real holding has subsequently been said by the Nebraska court to have been that one who constructs a canal to carry water for hire has a right to an appropriation which continues as a developing right until all lands along the canal, for which the water was originally appropriated, use the water. *Kearney Water & Electric Power Co.* v. *Alfalfa Irr. Dist.*, 97 Nebr. 139, 144–145 (1914). And in that *Kearney* case the court speaks in terms of ownership by the canal company. The same court, in *Farmers' & Merchants' Irr. Co.* v. *Gothenburg Water Power & Irr. Co.*, 73 Nebr. 223 (19[illegible]), had upheld the right of a canal company to change the place of use of water,

to lands in other ownership, to the detriment of an intervening appropriator, a result which could follow only from a recognition of proprietary rights in the company independent of the rights of water users under the canal. In *Vonberg* v. *Farmers Irr. Dist.*, 132 Nebr. 12 (1937), the court specifically recognized that former opinions had indicated that canal companies did not own water rights but expressly stated that that point had not been involved in the cases, and went on to uphold a grant of water made by a canal company as against a successor to that company which challenged the validity of the grant. Pertinent also is *McCook Irr. & Water Power Co.* v. *Crews*, 70 Nebr. 115, 123 (1905), a case holding that a canal company's right to divert water could not be interfered with without just compensation, in which the court said that the company,

> * * * as an appropriator, has acquired a vested right in and to the use of the water appropriated by it under the laws of the state governing the taking and use of water for purposes of irrigation. * * * The plaintiff's right under its appropriation has ripened into a legal estate, and for any invasion of or injury to the same the law will afford a remedy.

This *McCook* case was followed in the similar case of *Nine Mile Irr. Dist.* v. *State*, 118 Nebr. 522 (1929), but there emphasis was laid on the assertion that the result flowed from the fact that the

right was initiated prior to the legislative declaration that unappropriated water is the property of the public in the Irrigation Code of 1895. Whether the right was initiated before or after 1895 would seem to be immaterial, however, since a dedication to the public, even if effective, does not prevent the acquisition of private property rights in the water and since the court in the earlier *McCook* case had recited but given no significance to the legislative dedication.

Consequently, we submit that under Nebraska law, the United States secured a property right in its project water rights, to which the control of Congress thereafter attached—irrespective of the special Nebraska statutes recognizing rights in the United States as heretofore discussed.

Although the Government has made no filings in Colorado and diverts or stores no water in Colorado, its rights to the use of water on the Kendrick and North Platte projects therefore being in no sense dependent on Colorado law, the situation of canal companies and irrigation districts there may profitably be viewed briefly since it is party to this suit and also since it is one of the three States, already mentioned, sometimes referred to as holding that no water right accrues to such an organization.

Wheeler v. *Northern Colorado Irr. Co.*, 10 Colo. 582 (1888), is frequently cited for the conclusion that an irrigation company acquires no right in

water which it carries. The court does say (10 Colo. at 588), that it cannot consent to the proposition that such a company becomes a "proprietor" of the water diverted, but it also recognizes that certain unenumerated rights do exist in the company. In *Wyatt* v. *Larimer & Weld Irr. Co.*, 1 Colo. App. 480 (1892) the *Wheeler* case was extensively analyzed and criticized, the court holding that to avoid absurd conclusions it must be recognized that a canal company is the proprietor of the water diverted by it. That case, however, went to the Colorado Supreme Court (18 Colo. 298), where, as admitted dicta, the court approved the *Wheeler* case doctrine, but disposed of the case purely on the basis of the contracts for delivery of water made by the canal company.

Other Colorado cases sometimes cited on this proposition are *Farmers' High Line Canal & Res. Co.* v. *Southworth*, 13 Colo. 111 (1889); *Combs* v. *Agricultural Ditch Co.*, 17 Colo. 146 (1892) and *Farmers' Independent Ditch Co.* v. *Agricultural Ditch Co.*, 22 Colo. 513 (1896). Actual decision in none of those cases required consideration or definition of the proprietary interest of the canal company. *Wright* v. *Platte Valley Irr. Co.*, 27 Colo. 322 (1900), and *Combs* v. *Farmers' High Line Canal & Res. Co.*, 38 Colo. 420 (1907), reiterate the doctrine of consumer ownership rather than canal company ownership, but both cases whittle down that doctrine, the latter case ac-

knowledging rights in the company which must be combined with the users' rights to constitute a complete appropriative right, and the former case holding that the user could make use of the water only on the lands designated in his contract with the canal company.

Of primary significance, however, are *City and County of Denver* v. *Brown*, 56 Colo. 216 (1913) and *People* v. *District Court*, 63 Colo. 511 (1917), two related cases involving the same controversy; in those cases the court squarely recognizes that a water company has a water right which it can parcel out piecemeal under short term rental contracts, the contracting parties' rights being limited by the terms of the contracts. The effect was to constitute the company "the proprietor of the appropriations", as the court specifically recognizes in the latter opinion."

" Various other Colorado cases deal in one way or another with various phases of this problem. None has been found, however, which renounce the doctrine of the City and County of Denver litigation. That doctrine was acknowledged as recently as 1938 in *Board of County Commissioners* v. *Rocky Mountain Water Co.*, 102 Colo. 351 (1938). In that case the court, however, also stated that a "ditch company does not own the water" but combined that statement with express acknowledgment that "the issues here do not require a decision as to the ownership of water or the rights of appropriations." 102 Colo. at 362.

Of the other Colorado cases it is submitted that the following are necessarily predicated on the recognition of a proprietary interest in the irrigation company, irrespective of the language used: *Water Supply & Storage Co.* v. *Tenney*, 24

Thus, even in Colorado, it appears that a canal company acquires a proprietary right of such a nature as to give to it powers of control over the use of water, powers which, when created in the United States, bring into operation the controls set up by Congress in the reclamation laws to the exclusion of state law where inconsistent.

6. The Ide *case and related cases require the conclusion that, if the United States' first cause of action is not good, this second cause of action is sound*

As has been already discussed, the case of *Ide* v. *United States*, 263 U. S. 497, specifically holds that the United States is entitled to return flow water on Federal reclamation projects on the basis that the United States does not sell project water to project water users, that it merely passes a limited right of use to them, that it retains all rights, beyond that, incident to the project appropriation and that it does not give up all rights of control over water. To the same effect are *United States* v. *Haga*, 276 Fed. 41 (S. D., Idaho), and *Ramshorn Ditch Co.* v. *United States*, 269 Fed. 80 (C. C. A., 8). *Cf. United States* v. *Tilley*, 124 F. 2d 850 (C. C. A., 8) certiorari denied, *sub nom. Scott* v. *United States*, 316 U. S. 691; *United States* v. *Warmsprings Irr. Dist.*, 38 F. Supp. 239

Colo. 344 (1897); *Model Land & Irr. Co.* v. *Madsen*, 87 Colo. 166 (1930); *Kurtz* v. *Reorganized Catlin Canal Co.*, 96 Colo. 227 (1935); and *Costilla Ditch Co.* v. *Excelsior Ditch Co.*, 100 Colo. 433 (1937).

(D. C., Ore.). The latter two cases reach the conclusion that the United States owns designated return flow water, but in each the court apparently bases that conclusion on state law to the exclusion of the theory that the United States owns project water rights. It is clear, however, that the *Ide* case and the two Federal cases first cited, proceed on the theory of Government ownership of project water rights, and that the *Ide* case is controlling, establishing the propriety of the Government's second cause of action and establishing the basis of the necessity of apportioning project water to the United States in this case.[a]

D. *The Special Master's Conclusions as to Storage Water are in Part Ambiguous and are Inconsistent With the Apportionment Recommended by Him, Excluding the United States*

The Special Master concludes that the United States is an appropriator of water for storage under the laws of Wyoming (page 11 of the report) and that the United States is the legal owner of the storage appropriations (page 141). But the fourth sentence of his conclusion number 11 (erroneously numbered 10) on page 11 of his report is ambiguous as to whether the United States owns and has authority over storage water or whether that ownership and authority go only to

[a] The *Ide* case, of course, does not militate against the United States' first cause of action, the propriety of which the United States continues to maintain.

the storage works. Clearly the United States is entitled to be recognized as the owner of that water, invested with full control over its disposition and use under Wyoming law. Wyo. Rev. Stats. (1931) sec. 122–1602. See *Scherck* v. *Nichols, supra,* (55 Wyo. 4, 17). That is the very least the United States is entitled to, and recognition of that type is necessary to protect the contract rights in storage water set up between the United States and its project water users and Warren Act contractors both in Wyoming and Nebraska. Those contractual rights in storage water the Special Master properly concedes to be outside the scope of this litigation and the protection of his proposal for decree.

The United States points out, however, that it is as much the owner of and entitled to control over the disposition of project natural flow water as it is over storage water under Wyoming law, as discussed in the preceding section of this brief. It is as much the legal owner of the natural flow appropriations as it is of the storage appropriations.[48] Therefore, the Special Master's apparent conclusion as to storage appears to be inconsistent with his rejection of the entire second cause of action of the United States. And, as has already

[48] Even the proceedings for "adjudication" of the two types of water pursuant to Wyoming law were the same. In fact, the same "adjudication" covered reservoir water as well as natural flow. Nebr. Exhs. 571, 572, 576, 577; Wyo. Exhs. 7, 8.

been seen, recognition of the natural flow water right in the United States would require apportionment of natural flow to it since no state can stand in judgment for the United States.

Also, it may be pointed out that failure to recognize the United States as entitled to apportionment of project natural flow water affects the distribution of storage water, a distribution which the Special Master seeks not to affect by his proposals but to leave to the contracts between the United States and the water users (report, conclusion 9, page 10). Those contracts do not deal with storage and natural flow separately; storage is to be used to supply deficiencies in natural flow or water from other sources. Consequently, allocation of project natural flow to the states gives them indirect control over storage releases. Under the Special Master's proposals for decree, for example, Nebraska can give natural flow water to the Tri-State Canal to the full extent of its state-recognized right of over 900 second feet of continuous flow, at the expense of the Nebraska lands of the North Platte Project. That 900 second feet of continuous flow for Tri-State is more than the Special Master takes into account for that canal in making his apportionment; it is also more than the Warren Act contract for that canal allows. The deficiency for project lands would have to be made up by the United States from storage under its contracts.

Actually storage water would be depleted, not for the ultimate benefit of project lands, but for the ultimate benefit of Tri-State lands over and above the benefits to which that canal is entitled under its Warren Act contract. So, too, as another example, Wyoming could continue as she has in the past to allow her canals below Whalen to divert excessive amounts of water at the expense of project lands in Wyoming which then would have to call on storage for the deficiency. And so, too, for that matter, can Nebraska under the Special Master's proposals send direct flow water within her apportionment to canals below the Tri-State Dam, although the Special Master concludes that they do not need it (conclusion number 5, page 9 of his report) and does not include the requirement of such canals in setting up the formula for apportionment (recommendations numbers 3 and 6, pages 177–179 of his report). As Nebraska does so, she places the burden on storage to make up the deficiencies caused to project lands above the Tri-State Dam.

These results all have serious effect on the operation of the reservoirs, the distribution of storage water and the ability of the United States to perform its contracts for delivery of storage water. They also have serious effect on the balance of water uses sought and recommended by the Special Master within the Whalen to Tri-

State Dam section of the river and between that section and others. None of those consequences are desirable within the framework of the Special Master's recommendations. They are inconsistent with the basic principles underlying the recommended apportionment. They are largely avoidable by recognition of the right of the United States to apportionment to it of project natural flow water, as has already been seen to be appropriate and necessary in any event.

II

(Exceptions II and VII)

THE DECREE TO BE ENTERED IN THIS CASE SHOULD LIMIT FUTURE ACCUMULATIONS IN RESERVOIRS ON TRIBUTARIES BETWEEN PATHFINDER AND GUERNSEY, AS IS RECOMMENDED BY THE SPECIAL MASTER FOR AREAS ABOVE PATHFINDER

A. *Statement of the Case Relating to These Exceptions*

These exceptions deal with the Special Master's conclusion that no limitation need be placed on future accumulation of water in reservoirs on tributaries in the river section between Pathfinder and Guernsey reservoirs and with his failure to recommend any such limitation.

The record in this case, despite its bulk, does not contain any evidence showing the full amount of irrigation development, including reservoirs, on these tributary streams. The Special Master, in that connection, states generally, "There are hun-

dreds of small diversions on these tributaries, regulation of which could be of little, if any, benefit to the river below." Report, p. 52. In further reference to the effect of this tributary development, he also states (report, pp. 145–146):

> * * * As already seen, the run-off of the tributaries becomes so far exhausted before any shortage of water occurs in the main river that any regulation of the tributary diversions would be of no material benefit to anyone. On the argument it was suggested that any increase of storage on the tributaries might reduce the outflow now available for storage in the off-channel reservoirs of the Interstate Canal, and should for that reason be restricted. However, there is no showing as to what contribution, if any, these tributaries now make to the supply of the reservoirs or what additional storage projects may be feasible on the tributaries or what the effect of their construction and use might be on the supply otherwise available for the reservoirs. There is insufficient basis for finding any threat from this source requiring attention in the decree.

The United States does not except to these statements insofar as they relate to diversions of natural flow. It does, however, except to them as they relate to storage.

The record shows facts regarding some developments on tributaries in this area. As to the

La Prele Project it appears that there is a reservoir of 20,000 acre-feet capacity fed from various tributaries in that area, that that reservoir filled completely in two years during the drouth period and that it substantially filled in several other years during that period. Tr. 18656–18660, 18678–18679. It also appears that there are permits for this project covering some 16,000 acres, although only some 11,000 acres have made final proof of irrigation use, the remaining acreage being still susceptible of future irrigation. Tr. 18662–18668, 18672–18677. The full reservoir capacity is required to irrigate the 11,000 acres now using water. Tr. 18686–18688. Of recent years transbasin diversions from other tributary streams have been made to bring a larger supply to the project for storage. Tr. 18685–18686, 18690–18691. All priorities on this project are junior to the North Platte Projects' 1904 rights. Tr. 18677, Wyo. Exh. 58 (Tr. 18647–18648).

B. *There is Danger of Future Injury to the Whalen to Tri-State Section of the River by Increased Storage on These Tributary Streams as a Result of Which a Limitation Should Be Fixed*

From the facts outlined above concerning the La Prele Project it is apparent that it alone is a sizable development, that there is additional land susceptible of irrigation by it, the permit rights

for which are being kept alive to allow for future irrigation, and that to irrigate that land will require additional storage. It is also apparent that the run-off available for storage on La Prele Creek is susceptible to supplementation from other tributaries, and that in a number of years even during the drouth period the storable flow available has been at least to the capacity of the present reservoir, or substantially so. The Special Master also finds that tributary inflow to the river in this area generally was substantial even during the drouth period. Report, pp. 52–53.

These circumstances combine to show the possibilities of future additional storage use on these tributaries. And obviously future storage use means reduced tributary flows into the main river available for storage in the Guernsey, Lake Alice and Lake Minatare reservoirs of the North Platte Project.[66] Furthermore, all the water supply studies in the record of this case on which the Special Master relies and his own analysis of water supply for the Whalen to Tri-State Dam

[66] Return flows would result from the use of additional storage water on the tributaries (*cf.* Tr. 18660–18662), but they would come later in the season as natural flows, when natural flow is normally low, and would not be available for storage. Also, those return flows would not be a substitute for project storage since the original quantity of water would be reduced by the amount consumptively used or lost in the irrigation on the tributaries.

section assume the continued existence of present irrigation uses above Guernsey. Consequently, the maintenance of the balance of water supply worked out by the Special Master and incorporated in his recommendations, would be disturbed by any additional utilization of storage facilities on these tributaries. Pertinent, of course, is the fact that the Special Master finds that the historical supply for the Whalen to Tri-State section was only barely adequate in the 1930–1940 period to meet the requirements which he finds to exist there, if perfect control and regulation were applied. Report, pp. 65–68.

In these circumstances the United States submits that limitation on storage utilization on tributaries between Pathfinder and Whalen should be included in the decree to protect the equitableness of its operation. Since the extent of present reservoir storage in this area cannot be accurately determined from the record, the limitation should merely be against the future construction of additional reservoirs or reservoir capacity. Such a limitation would, of course, be subject to the right of Wyoming to seek its removal in the future on a showing of changed conditions of water supply available for the Whalen to Tri-State Dam area, in accordance with the Special Master's conclusion number 10 and recommendation number 8 (pp. 10 and 179, respectively, of his report).

C. *Limitation on Future Storage in this Area is Justified on the Same Basis as are the Limitations Recommended for Areas Above Pathfinder*

The justification for the imposition of limitations on storage on the tributaries between Pathfinder and Guernsey, as shown in the preceding subsection, is as great and substantially similar to the justification for similar limitations recommended by the Master (recommendations 1 and 2 on page 177 of his report) for the Colorado and Wyoming areas above Pathfinder Reservoir."

It may also be pointed out that the Special Master recommended that the Seminoe Reservoir of the Kendrick Project must respect the seniority of the Pathfinder and Guernsey reservoirs. Report, recommendation number 4, p. 178. That seems inconsistent with the recommendation that no limitations whatsoever be put on future storage on tributaries below Pathfinder. The justification for the treatment of the Kendrick Project and the Seminoe Reservoir, as contained at pages 137–143 of the report, is no more conclusive as to possible injury in that instance than are the facts relative to future storage operations on tributaries below Pathfinder. The only basic distinction is that the Seminoe Reservoir is now built.

" The justification for the recommended limitations above Pathfinder is set out in the Special Master's report at pages 125–136.

That requires that the limitation be on future use rather than on future construction. It does not, however, affect the justification for limitation.

In these circumstances the United States submits that the recommendation of the Special Master that no limitation be placed on storage uses below Pathfinder is inconsistent with his recommendations, the propriety of which the United States urges, that limitations should be fixed on reservoir uses of the Kendrick Project and other areas above Pathfinder.

III

(Exceptions III and XIV)

THE UNITED STATES MUST BE AND CONVENIENTLY CAN BE INCLUDED IN THE APPORTIONMENT OF THE WHALEN TO TRI-STATE DAM SECTION, THE NATURE OF WHICH APPORTIONMENT SHOULD IN ANY EVENT, HOWEVER, BE CHANGED

A. *Statement of the Case Relating to These Exceptions*

These exceptions concern the conclusions and recommendation of the Special Master that the allocation of natural flow in the Whalen to Tri-State Dam section be on the basis of 25 per cent to Wyoming and 75 per cent to Nebraska, omitting the United States and also rejecting the United States' proposal that apportionment in this section be in accordance with a priority schedule.

All of the facts pertinent to this matter are contained in the Special Master's report and, for

present purposes, are adequately summarized at pages 148–164 of that report.

B. *The United States Should Receive a Percentage Apportionment if the Special Master's Method of Allocating Natural Flow Water in the Whalen to Tri-State Dam Section is Adopted*

The right of the United States to participate in the apportionment of natural flow water in the Whalen to Tri-State Dam section is dependent on and, it is submitted, established by the discussion in Part I, *supra*.

The amount of the apportionment to which the United States is entitled under the Special Master's flat percentage method of apportionment is primarily a matter of computation from the data in his Table XVII, page 86, of the report. On an acreage basis the United States would be entitled to 63.64 percent while the Nebraska and Wyoming percentages would be reduced to 26.54 and 09.81, respectively. Those percentages vary when the computation is on a requirement or an acre-foot basis, being 65.97 for the United States, 25.30 for Nebraska and 08.72 for Wyoming, the variation resulting from the differing needs for water found and taken into account in the report. The Special Master does not indicate whether he conceives acreage or requirement to be the more significant in determining a proper percentage for apportionment, his recommended 75–25

apportionment between Nebraska and Wyoming actually halving the difference between the results of the two possible methods of computation. See table on page 152 of the report. It is submitted, however, that the recognized need for water is clearly the more equitable basis for apportionment and therefore the United States takes the position that, if a flat percentage basis of apportionment is to be used, the appropriate percentages, carried to the nearest full percentage point, are: United States, 66 percent; Nebraska, 25 percent; Wyoming, 9 percent.

The United States believes, however, that such an apportionment is not equitable. For practical purposes, in the present inquiry, it may be said that the United States is the most junior in point of priority date. To allow it to take 66 per cent of the natural flow when the stream is low would not be just. Consequently, it is suggested that all natural flows in this river section up to and including 1526 second feet be apportioned 75 per cent to Nebraska and 25 per cent to Wyoming, in accordance with the Special Master's recommendation, and that all flows over 1526 second feet be apportioned 97 per cent to the United States, 1 per cent to Nebraska and 2 per cent to Wyoming.[46] The 1526 second feet are all the

[46] The percentages of flow over 1526 second feet, carried out to one more decimal place are: United States, 97.6; Nebraska, 00.5; Wyoming, 01.8. These percentages are

water found to be required by the Special Master for rights of priority dates ahead of December 6, 1904, the effective date of the North Platte Project rights. Compare tables XVII and XIX, pages 86 and 154, respectively, of the report.

C. *A Priority Schedule for Application in the Whalen to Tri-State Dam Section is a More Equitable Basis of Apportionment Than the Flat Percentage Method Recommended, and is Legally Permissible*

At page 149 of his report the Special Master lists three objections against the use of a priority schedule as the basis for apportionment in this river section: (1) It would deprive each State of freedom in interstate administration; (2) it is a serious question whether due process of law would not require that the individual appropriators be parties if their specific rights were to be fixed as they would be under a priority schedule; and (3) such a schedule would burden the decree with administrative detail. The basis of the second objection is more fully developed at pages 160–161 of the report.

The first and third objections are, it is submitted, not substantial. If equity between these

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figured from the second-foot data in Table XVII on page 86 of the report, with the Northport second-foot allowance increased to 186 in accordance with United States Exception XXIV, the application of which here can be subject to little controversy since it applies only in times of large or relatively large stream flow.

parties requires limitation on the States' intrastate administration certainly it can be accomplished. And so, too, as to the placing of administrative detail in the decree.[87] The only real question is of the desirability of incorporating such matters in the decision. Pertinent to that is the fact that the priority schedule to be imposed on the intrastate administration of each State is applicable only in this relatively short river section and that each State administers its streams on a priority basis in any event.[88] Also pertinent is the fact that the priority schedule to be fixed in the decree, for this short river section, is not complex, requiring only the data contained in Table XVII on page 86 of the Special Master's report.

It is basically significant that the adoption of a priority schedule in this section would achieve the most equitable results. As the Special Master points out on page 149 of his report, it is not subject to the various adverse equitable considerations which preclude the adoption of a river-wide priority schedule. And it does, of course,

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[87] That the prime, basic and controlling consideration in interstate litigation over water is equitableness is clearly apparent from *Kansas* v. *Colorado*, 206 U. S. 46; *Wyoming* v. *Colorado*, 259 U. S. 419; *Connecticut* v. *Massachusetts*, 282 U. S. 660; *New Jersey* v. *New York*, 283 U. S. 336; and *Washington* v. *Oregon*, 297 U. S. 517.

[88] They may not, however, recognize the same acre-foot and second-foot limitations determined on by the Special Master.

directly adopt the principle of priority as a basis of allocation, which principle the Special Master recognizes as the most important single equitable element to be taken into account where feasible. Report, pp. 9 (para. 4), 112–113. The various facts developed at pages 148–162 of the report show the inequitableness of failure to adopt a priority schedule here—particularly the facts at page 159, which show that, on the 75–25 percentage basis of apportionment, Nebraska would get 75 second feet out of the first 100, to none of which she is entitled on a priority basis in times of extreme low flow, and that Wyoming would get 225 second feet out of the next 900 to none of which she is entitled on a priority basis.

In that connection it also is important that in instances where those inequities would result in a reduced supply for project canals or Warren Act contract canals, the deficiencies would have to be made up from storage water, thereby ultimately depleting that source of supply for those who have contracted for it and are paying for it. That same effect on storage water results also if, for example, Nebraska uses her share to provide a supply for non-storage right canals, above or even below the Tri-State Dam, as she is entitled to under the Special Master's recommendations, at the expense of storage right canals, or gives to a storage right canal more than the Special Master allows for it in his apportionment, again at the

expense of other storage right canals. That result, too, would be avoided if a priority schedule for natural flow were substituted for the Special Master's percentage distribution.

The United States submits that a priority schedule can be adopted in this river section, thereby establishing the more equitable basis of apportionment, without violating the concept of due process of law as to the absent appropriators. In interstate litigation of the type here involved the state appears as "*parens patriae,* trustee, guardian or representative" of its citizens. *Kansas* v. *Colorado,* 185 U. S. 125, 142; *Louisiana* v. *Texas,* 176 U. S. 1, 19. See *Missouri* v. *Illinois,* 180 U. S. 208, 236. The concept of *parens patriae,* of course, embodies the power of control over the person and property of citizens, usually minors or incompetents, who have no rightful protector. *New York Life Insurance Co.* v *Bangs,* 103 U. S. 780. It would seem clear, therefore, that in interstate litigation the states actually represent their citizens, in this instance their water users, and that they are, in contemplation of law, before the court. *Cf. North Dakota* v. *Minnesota,* 263 U. S. 365; *Kentucky* v. *Indiana,* 281 U. S. 163; *Pennsylvania* v. *West Virginia,* 262 U. S. 553.

In *Hinderlider* v. *La Plata River, etc., Co.,* 304 U. S. 92, the company sought to enjoin the State Engineer of Colorado from complying with the terms of a compact between that state and

New Mexico apportioning the water of the La Plata River. The complaint was that the company was deprived of its property by reason of the fact that the compact gave New Mexico junior appropriators precedence over the company in certain instances. This Court announced the rule that since the water is used beneficially in both States it must be equitably apportioned between them and that the rights of appropriators can rise no higher than those of the State. At pages 106–108 the Court said:

> Third. Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact. That the private rights of grantees of a State are determined by the adjustment by compact of a disputed boundary was settled a century ago in *Poole* v. *Fleeger*, 11 Pet. 185, 209, where the Court said:
>
> "It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all

intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union; unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, that it is expressly recognized by the Constitution and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress."

* * * * * *

The rule as applied to the apportionment by judicial decree of the water of an interstate stream was stated in *Wyoming* v. *Colorado,* 286 U. S. 494, 508:

"But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was 'not between private parties' but 'between the two sovereignties of Wyoming and Colorado;' and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indis-

solubly linked with those of her appropriators. 259 U. S. 468. Decisions in other cases also warrant the conclusion that the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree."

Certain it is that private rights are no more affected by use of a priority schedule here than was the right of the company in the *Hinderlider* case, and from the quotation given it is equally certain that no distinction exists because a compact was involved there. Likewise, it is clear that, in state boundary disputes, as indicated in the *Hinderlider* opinion, the absence of parties whose titles may be invalidated has never been held to be a bar to the granting of relief. In that connection particular significance attaches to *Florida* v. *Georgia*, 17 How. 478, where the importance of the decision for present purposes is pointed out specifically in the dissenting opinions, and *United States* v. *Texas*, 162 U. S. 1, the decision of which was later held to be *res adjudicata* in a proceeding to which private land claimants were parties although they had not been parties in the original litigation (*Oklahoma* v. *Texas*, 256 U. S. 70).[*]

[*] Other pertinent boundary dispute cases, although many contain no discussion of this problem, include *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Missouri* v. *Kentucky*, 11 Wall. 395; *Indiana* v. *Kentucky*, 136 U. S. 479; *Nebraska* v. *Iowa*, 143 U. S. 359; *Louisiana* v. *Mississippi*, 202 U. S. 1.

Consequently it seems evident that a priority schedule can legally be imposed on this river section and that to do so would further the equitableness of the apportionment proposed.

If, however, the Court should share the Special Master's concern as to the propriety of a fixed priority schedule, it is urged nevertheless that the flat percentage method be not adopted because of its inequitableness and that, instead, a schedule of varying percentages for varying flows of the stream be adopted from the first two columns of Table XIX on page 154 of the Special Master's report. The minimum schedule of such a type is that set out at page 159 of the report, for the last line of which the following should be substituted in accordance with the contention made in section "B" of this part of this brief:

	Wyoming	Nebraska	United States
Flows over 1526 second feet	2%	1%	97%

IV

(Exceptions IV and XV)

THE DECREE TO BE ENTERED HEREIN SHOULD CONTAIN A DEFINITION OF STORAGE WATER IN ACCORDANCE WITH THAT SUGGESTED IN EXCEPTION IV

A. *Statement of the Case Relating to These Exceptions*

These exceptions deal with the omission from the Special Master's report and from his recommendations of a definition of "storage water".

On page 5 of his report the Special Master defines "natural flow" or "direct flow" as all water in a stream except that which comes from storage water releases. But nowhere are "storage water" and "storage water releases" defined.

B. *A Definition of "Storage Water" is Necessary to Effective Operation of the Decree to be Entered*

The "Recommendations for Decree" at pages 177–180 of the Special Master's report contain a suggested apportionment of natural flow water. Since, however, natural flow is defined merely as all water which is not storage, the operation of the proposed decree, or any apportionment of natural flow alone, is uncertain in the absence of a definition of "storage water" or "storage water releases."

An example can be taken from the operation of paragraph 3 of the recommendations on pages 177–178 of the report. The Government reservoirs are permitted to store water not needed for the natural flow rights of Nebraska canals as limited in the tabulation on page 178 of the report. Suppose, however, that Nebraska permits some of that natural flow water to go below the Tri-State Dam, as is permissible under the Special Master's recommendations, thereby causing the Gering or Tri-State Canal to be short. Under the Warren Act contracts those canals would be

entitled to have any deficiencies replaced by the United States. But under this proposed decree only storage water and *not* natural flow could be supplied. Unless storage water is defined to include water released from the reservoirs even at a time when they are withholding or storing water under the terms of paragraph 3 of the recommendations, the contract provisions cannot be met without violation of the to-be-decreed limitations on natural flow to be passed to the State of Nebraska. Such would be the result if storage water were defined to exclude all water passed through a reservoir at any time when its inflow is as great or greater than its outflow, a definition applied in interpretation of a consent decree in *Gila Valley Irr. Dist.* v. *United States*, 118 F. 2d 507 (C. C. A. 9).

C. *The Nature of the Definition To Be Used Follows From the Necessity for Definition*

The example of the need for definition of storage water which has just been given, itself indicates the type of definition which is required to meet the contingencies of the decree recommended in this case. Consequently the United States urges the following as the only definition which fully meets the situation:

> Storage water is any water which is released from reservoirs for use on lands under canals having storage contracts in

addition to the water which is discharged through those reservoirs to meet the natural flow requirements of any canal as recognized or prescribed in this decree.

The fact that this definition is, in part at least, contrary to the definition recognized in the *Gila Valley Irr. Dist.* case, *supra,* is not important. There the court was merely interpreting or defining the concept "storage water" as it had been used in a consent decree. In doing so the court looked to all the provisions of the decree to determine what was intended. It did not merely apply some extraneous and fixed definition. Nor could it have done so, for, so far as counsel have been able to discover, there is no fixed or absolute definition on which reliance can be placed. The situation is, as it was in the *Gila* case and as it is in this case, that the definition of storage water must be made to fit the exigencies of the decree to be entered. The definition urged here by the United States does that and accords fully with the basic theories and principles of the Special Master's conclusions and recommendations.

The statutes of Wyoming, where the storage works exist, in no way militate against this proposed definition. The only provision which appears to bear any relationship to the problem is Section 122–1508, Wyo. Rev. Stats., (1931):

122–1508. Use of water from reservoirs. The use of water stored under the provi-

> sions of this article may be required under such terms as shall be agreed upon by and between the parties in interest. Lands entitled to the use of water in any reservoir may use the water stored therein, and to which they are entitled, at such times and in such amounts as the water users may elect, provided, that a beneficial use of water is made at all times.

That provision, of course, merely recognizes the effectiveness of the contracts which have been made and the effectiveness of which requires a definition in this decree of the type urged.[70]

The basic limitation on any storage operations, of course, is that they be conducted in such a manner as not to interfere with prior rights. 2 Kinney on Irrigation (2d Ed.), p. 1474. The definition of storage urged here, which has effect on the storage operations, clearly does not adversely affect any rights recognized or defined in the proposed decree. Instead, it serves to give protection to them.

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[70] The Nebraska statutes clearly recognize the right of the United States to store and to contract for disposal of "any unappropriated, flood or unused waters." Sec. 46–628, Nebr. Comp. Stats. (1929). Colorado statutes merely give the right to store unappropriated water generally. Sec. 90–79, Colo. Stats. Ann. (1935).

V

(Exception VI)

WYOMING AND COLORADO SHOULD BE REQUIRED TO MAINTAIN COMPLETE, ACCURATE AND AVAILABLE RECORDS OF IRRIGATION AND STORAGE OF WATER IN AREAS ABOVE PATHFINDER

A. *Statement of the Case Relating to these Exceptions*

In paragraphs 1 and 2 of his recommendations (p. 177 of the report) the Special Master proposes injunction against irrigation of more than stated acreages in Wyoming and Colorado above Pathfinder Reservoir and against storage of more than stated amounts of water in that area. He does not, however, recommend that those States be required to keep complete, accurate and available records of such matters. This exception goes to that omission.

In the past there has been no actual record of acreages irrigated or water stored in either State above Pathfinder. As to the Wyoming area there has actually been very little evidence presented even of present irrigation. Thus the Special Master was required to state that it does not appear as to what present irrigation in that area is under rights junior to Pathfinder and to suppose that a smaller percentage of junior acreage actually is irrigated than of senior acreage. Report, p. 49. Also he concluded that "the area now un-

der irrigation cannot be exactly determined from the evidence, and the figures which have been mentioned rest partly upon estimates." Report, p. 135. The type of material available as to acreage irrigated at any point of time in Wyoming above Pathfinder and its inconclusive character, is shown by the testimony of the Colorado witness Patterson who supervised the only overall examination made into that problem and explained his method at pages 24341–24345 of the Transcript.

The acreage irrigated currently in Colorado, and the storage of water in that area, has been determined, and introduced in evidence, by a special study. The nature of that examination and the fact that no continuing records for the past or future exist is apparent from the witness Patterson's testimony at pages 22111–22125 of the Transcript and from the related Colorado exhibits 39 and 40.

B. *Without Such Records the Decree Cannot Be Effective*

Unless there be complete, accurate and available records which can be checked at any time, Colorado and Wyoming obviously cannot know whether or not they are living within the acreage and storage limitations recommended for inclusion in the decree. Neither, of course, can the other interested parties.

In the absence of such records, current aerial photographs and field investigations would have

to be made each time any question arose. To do that would obviously require more time than would be available during any season in which non-compliance might exist and more money than is justified. Furthermore, for every succeeding season the irrigation might be different.

The maintenance of continuous records, however, would be much more simple and would not be unduly burdensome for Colorado and Wyoming which have some machinery and officials for water administration in the areas in any event. Whatever the added burden to them, it is a necessary incident of the controls found necessary and recommended.

With such records, spot checks can easily be made from time to time if there be need thereof to determine compliance with the recommended decree. Without such records, the recommended decree cannot be effective.

VI

(Exception VIII)

THE SEMINOE RESERVOIR SHOULD BE ELIMINATED FROM APPLICATION OF THE RECOMMENDED LIMITATION ON STORAGE OF WATER ABOVE PATHFINDER RESERVOIR

A. *Statement of the Case Relating to This Exception*

As paragraph 2 of the Special Master's recommendations (report, p. 177) is stated, storage in all reservoirs in Wyoming above Pathfinder is to be limited to 18,000 acre feet of water during

any water year. Reference to the map opposite page 19 of the report shows that Seminoe Reservoir is above Pathfinder. Seminoe has a capacity of 1,026,400 acre feet (report, p. 35) and, in paragraphs 3 and 4 of the Special Master's recommendations, is given specific treatment on a basis other than that adopted for other upriver reservoirs in paragraph 2.

B. *Seminoe Reservoir is Inadvertently Included in, but Should be Excluded from the Operation of Paragraph 2 of the Special Master's Recommendations*

On the facts as stated it is apparent that Seminoe Reservoir was not intended by the Special Master to be included within the operation of his recommendation number 2 and should be expressly eliminated therefrom. Its operation will be fully controlled under recommendations numbers 3 and 4. That this is intended by the Special Master is further shown by his conclusion number 7, pages 9–10 of his report, and by the discussion at pages 137–143 thereof.

It should be pointed out, however, that recommendation number 2 is satisfactory as it stands if the United States be recognized as the party entitled to store water in the Seminoe Reservoir pursuant to the position taken in Part I of this argument. That conclusion follows from the fact that recommendation number 2 runs against Wyoming only.

VII

(Exception IX)

NEBRASKA'S EQUITABLE SHARE OR APPORTIONMENT OF NATURAL FLOW WATER SHOULD BE LIMITED TO THAT WHICH IS IN FACT BEING DIVERTED BY THE CANALS LISTED IN RECOMMENDATION 3 (b)

A. *Statement of the Case Relating to This Exception*

This exception seeks to prevent the use of natural flow water originating above the Tri-State Dam on lands served by diversions below that dam in such a way as to affect the equitableness of the recommended apportionment. The exception is addressed to the absence from recommendation 3 (a), on pages 177–178 of the report, of provision that, for purposes of operation of the Government reservoirs and the Kendrick Project, Nebraska's equitable share of natural flow water is limited to that which is in fact being diverted and used by any or all the canals listed in recommendation 3 (b), within the limitations in acre-feet and second-feet there fixed. The exception is so addressed since, in the mechanism of apportionment adopted by the Special Master, recommendations 3 (a) and (b) are the operative provisions in determining the amount of natural flow water to be passed into the Whalen to Tri-State Dam section of the river on Nebraska's behalf and thereby constitute an essential formula in the definition of the equitable

shares of the other parties in water originating above Whalen. The suggestion contained in this exception does not, then, disturb such distribution of water actually in the Whalen to Tri-State Dam section as is set up in recommendation number 6 or as might be substituted for it pursuant to Part III of this argument.

Recommendation number 6 (report, p. 179) recognizes the right of Nebraska to determine what portion of its share of natural flow water shall be delivered to particular canals. In other words, the State is left free to make whatever use it deems proper or best of its share of the water. This result seems to flow from the legal propositions suggested by the Special Master at pages 115, 149, 159–161 of his report.

The effect of this conclusion or recommendation is, as has been previously pointed out, that Nebraska can as it has heretofore, permit water to pass the Tri-State Dam for use below that point even though its equitable share is calculated only on the basis of needs by diverters at or above the Tri-State Dam. This remains true despite the Special Master's definite conclusions that lands supplied by diversions below Tri-State have no equitable claim on direct flow water originating in Wyoming or Colorado, that the needs of such canals are reasonably satisfied from local sources of supply, and that the claim of Nebraska is thus reduced to that for canals diverting at or above Tri-State. Conclusion num-

ber 5, page 9 of the report. Those conclusions are based on the facts found and stated at pages 92–99 and 254–267 of the report.

B. *The Equities Require and the Law Permits the Suggested Limitation*

In Part III of this argument it has already been contended that there is no legal prohibition against the fixing or limiting of individual rights in this case, a proposition which would permit absolute denial to any canal diverting below the Tri-State Dam of any water to which the Court found that it was not entitled equitably. Irrespective of that contention, however, it seems clear that the equitable share of a state may be determined in litigation such as this with such limitations as the equitable rights of the other parties may require, and irrespective of the indirect result which that may have on individual rights within the state. That is the very least that can be got from *Hinderlider* v. *La Plata River, etc., Co.*, 304 U. S. 92, and is directly applicable to this exception which seeks, not a prohibition against any uses below the Tri-State Dam, but a definition of Nebraska's equitable right to have natural flow water passed into the Whalen to Tri-State Dam section in which she can participate. There is, therefore, no reason why Nebraska need be left free to demand water from above Whalen to pass to users diverting below the Tri-State Dam if the equities of the

case, based on the facts, show the propriety of another treatment.

It is submitted that clearly the equities, based on the facts, both as found by the Special Master, do require other treatment. That would seem to be abundantly demonstrated by the conclusions, well supported by the facts, that lands served by diversions below Tri-State have no equitable claim on water originating in Wyoming or Colorado, that the needs of such diversions are reasonably met by local supplies and that Nebraska's claim is reduced to that for lands served by diversions above Tri-State. Clearly the Special Master has concluded that equitable apportionment requires no allocation of direct flow water for use below Tri-State. As clearly, the equitable apportionment need not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State.

Consequently, the reservoirs above Whalen should be permitted to store water and the Kendrick Project to divert as suggested in this exception, whenever the Nebraska canals at or above Tri-State Dam are not diverting and using natural flow or to whatever extent they are not diverting and using the amounts set up for them in recommendation 3 (b). If that not be done, Nebraska can in important respects circumvent the equitableness of the allocation recommended by passing natural flow water below the Tri-State Dam as has been done heretofore, thereby short-

ing the supply for Warren Act contract canals (and North Platte Project Canals if the United States be not determined entitled to an allocation separate from that of Nebraska). This in turn will necessitate the release of storage water to meet Warren Act (and project) obligations thereby reducing the total storage water available for those who have contracted and are paying for it. In effect, Nebraska is free to transfer the ultimate benefits of the storage water in material part from those entitled to it to those not entitled to it and to reduce the ability of the United States to meet the long-time obligations of its storage water contracts.

Also, if this limitation be not adopted, Nebraska by the same means can affect the water supply of the Kendrick Project. To the extent that North Platte Project storage is reduced in each year as discussed in the preceding paragraph, to that same extent is Kendrick storage in Seminoe Reservior delayed. Over a period of years that may accumulate into a vital deprivation of water to Kendrick, since Seminoe cannot store until Pathfinder is full under the Special Master's uncontested conclusions. Furthermore under recommendation 3 (a) Kendrick's natural flow diversions are subject to the same limitations as all Government reservoir storage. Consequently, unless this exception be granted, Nebraska can pass natural flow to those users below, Tri-State not equitably entitled to it at the expense of natural

flow diversions for Kendrick, which will be small and insecure in any event and which the Special Master designed to protect against demands below Tri-State. Report, pp. 137–143, particularly 140.

VIII

(Exception XI)

THE DECREE SHOULD BE SO DRAWN AS TO PERMIT OF JOINT OPERATION OF GOVERNMENT RESERVOIRS IN EVENT THE STORAGE CONTRACTS BE ALTERED IN A MANNER TO ALLOW SUCH OPERATION

A. *Statement of the Case Relating to This Exception*

The United States does not here controvert the conclusion of the Special Master (report, p. 144) that the storage water contracts, which it has entered into with project and Warren Act contract water users, preclude joint operation of the Seminoe and Pathfinder Reservoirs. It does take the position, however, that recommendation number 4, at page 178 of the report, should be so modified as not to preclude the possibility of joint operation in the future if the storage contracts should be modified in such a manner as to permit it.

B. *Permission for Joint Operation, if the Storage Contracts Should Be Amended to Permit of It, Is Desirable and Will Not Affect Other Rights on the River*

The Special Master apparently rejected this proposal of the United States on the ground that

mere adjustment of the contracts "might not clear the way for joint operation, for there would remain the question of rights under Wyoming natural flow appropriations senior to Seminoe but junior to Pathfinder." Report, p. 145.

It is submitted that that basis for rejection of the proposal is not well founded. Joint operation of the reservoirs need have no affect whatsoever on other appropriative rights no matter what their priority. Under any kind of operation Pathfinder must pass water for natural flow rights senior to it, but is entitled to store to the point of filling its entire capacity as against any rights junior to it. So it is also as to Seminoe, its priority date being different and later, however. Under joint operation the reservoirs operate on the Pathfinder priority until they have combined storage equivalent to Pathfinder. Thereafter they store no water except such as is not needed for appropriations having priorities senior to Seminoe. The situation is in no respect different in its affect on other appropriators than the situation which exists in separate operation of the reservoirs.

The joint operation, in the final analysis, affects only the distribution of the water stored, a matter of concern only to those having rights in that storage water. This exception, of course, contemplates joint operation only when those persons agree to it by modification of presently existing contracts.

In these circumstances, and since the Special Master properly finds that otherwise there are obvious advantages in joint operation, the decree should permit of it when and if the contracts are appropriately altered.

IX

(Exception XII)

RECOMMENDATION NUMBER 5 DEALING WITH KENDRICK PROJECT RETURN FLOW WATER IS TOO BROAD AND SHOULD BE RESTRICTED IN SCOPE

A. *Statement of the Case Relating to This Exception*

This exception, dealing with recommendation number 5 on pages 178–179 of the report, breaks itself into two parts: (1) That the prohibition against Wyoming use of Kendrick Project return flow water is too broad, probably inadvertently; and (2) that the United States should be permitted to divert water "at or above Alcova Reservoir as in lieu of" that portion of the Kendrick return flow which, without the construction of artificial drains by the United States, would never return to the river at all.

The facts pertinent to the second part of the exception are these, as shown by uncontroverted testimony of qualified experts, appearing at pages 28499–28501, 28507–28515, 28523–28525, 28536–28540 and 28549–28552 of the Transcript.

There are on the first unit of the Kendrick Project two surface depression or sump areas into

which return flow water from a considerable acreage of the unit will flow and for the removal of which the United States has already constructed drainage ditches which will return the water from the sumps to the North Platte River. On the second unit of the project (not yet constructed) there are three such sump areas which will collect the return flow water from a very large acreage, the removal of most of which is anticipated by planned drainage ditches which will return the water to the river. There is no natural drainage from any of these sump areas and the geological formations underlying and surrounding them are such that no underground drainage or percolation of water does or will exist. The water in those sumps is and will be removed only by evaporation or artificial drainage.

Consequently, it is established that the large quantities of return flow water finding their way into the sumps will never return to the river except through the artificial drains built or to be built by the United States as a part of the Kendrick Project.

B. *Wyoming Diverters Should Be Permitted the Same Use of Kendrick Return Flow Water as Is Permitted to Nebraska Diverters*

The Special Master's definition of natural flow water (report p. 5) includes return flow water. From the discussion of Kendrick return flows on pages 185–188 of his report, it seems that he also

contemplates that return flows, once returned to the stream and abandoned, are to be considered as natural flows available for use by all natural flow diverters within the limitations of his proposed apportionment of natural flow water.

Consequently it seems that the first clause of his recommendation number 5 is inadvertent in so far as it prevents Wyoming diverters from using Kendrick Project return flow water as natural flow. The matter would seem to be best resolved by substituting for that first clause a mere provision that return flows of the Kendrick Project are, for purposes of this decree, deemed to be natural flows when they have returned to the North Platte River without a declared and exercised intention on the part of the United States to recapture and reuse them in connection with that project. That provision is in full accord with the authorities and conclusions stated by the Special Master at pages 185–188 of his report and is equally effective whether the United States is or is not included in the apportionment of natural flow in the lower river."[11]

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[11] For purposes of this suit the United States is not now contending for the right to claim Kendrick return flow water for diversion on its downstream, but separate North Platte Project. That follows from the nature of the apportionment involved here and not from a concession of legal prohibition in normal circumstances against claim for and recapture and reuse of return flows from one project on another project of the United States.

6. *The United States Should Be Permitted to Divert Water at or Above the Alcova Reservoir for Use of the Kendrick Project "as in lieu of" That Portion of the Kendrick Return Flows Which Is Returned to the River From Sumps by Artificial Means*

The United States sought and the Special Master rejects the right to divert additional natural flow water for the Kendrick Project to the extent that return flow water from the project reaches the North Platte River and thereby becomes available for natural flow diverters below. Report, pp. 185–188 and recommendation number 5, pp. 178–179. The theory of the United States' claim was and is that to the extent that return flow from the project becomes available for use by lower direct flow appropriators, additional water is made available to them which they have never had before and to which they or the state has no equitable claim in a case such as this, and that it is equitable, then, that they be allowed the use of that water only if the United States be allowed to divert for the Kendrick Project, which furnished that additional water, a like additional amount of natural flow. The amount of water available to the downstream natural flow users would remain precisely what it was before. The Kendrick Project would get the full advantage of the storage water caught in and used from the Seminoe Reservoir which otherwise would

have run to waste in flood or winter seasons, and which, by diversion during the irrigation season, creates return flows usable by downstream natural flow diverters also during the irrigation season.[72] The proposal contemplates diversion for Kendrick of additional natural flow in lieu of the return flow itself, since the return flow appears downstream from the point of diversion for the project.

This proposal is based on the same concepts of equity in apportionment which operate in the Special Master's conclusion that no diversions in Nebraska below the Tri-State Dam are entitled to water originating in Colorado or Wyoming (conclusion 5, p. 9 of the report), for the water available to those diverters is largely return flow from the use of North Platte Project water and storage because of the presence of which users (and storage works) above the Tri-State Dam are permitted, equitably, to use natural flow which otherwise would pass below Tri-State. See report, pages 32–33 in conjunction with pages 92–96.

In these circumstances it seems that the indirect utilization of return flow on the Kendrick Project, by exchange or substitution of it for natural flow in the river below that point and diversion to Kendrick of the direct flow for which the return flow is substituted, is fully justified in this proceeding for equitable apportionment. That con-

[72] The facts stated here are based on those found by the Special Master at pages 138–139 of his report.

clusion is further fortified by the legal authorities cited by the Special Master at pages 185–188 of his report, particularly the *Ide*, *Haga*, *Ramshorn* and *Tilley* cases and also the case of *United States v. Warm Springs Irr. Dist.*, 38 F. Supp. 239 (D. C., Ore.). Under those authorities clearly the United States is entitled to recapture return flow water for further project uses so long as it has not been abandoned. The only remaining question then is whether it can make such use through the mechanism of an exchange whereby other water is taken in lieu of the return flow. Since no one is in any way injured by such an exchange it would seem that the question must be answered in the affirmative. And it was so answered in the *Warm Springs* case, *supra*. There the court, in declaratory judgment proceedings, was determining the rights of the United States and the irrigation district under a contract between them which specifically provided for just such an exchange of return flow for other water. The court upheld that right. The fact that the right was defined by contract does not, the United States believes, affect the basic problem of authority in law to effect the exchange.[11]

[11] The fact that no objection exists to the exchange of one type of water for another merely by reason of the exchange itself is indicated by Sec. 122-428 of the Wyo. Rev. Stats. (1931), which specifically permits the substitution or exchange of storage water for natural flow water diverted by one who owns a storage right so located that he can not take the storage water onto his own land.

The Special Master, however, has denied that right to the United States (or Wyoming on his view of the case). His conclusion on page 188 of his report, however, does not justify the full denial which is incorporated in his recommendation number 5. His conclusion goes only to return flow water "allowed by natural drainage" to reach the river. In the statement of the case relating to this exception it has been shown that the unused water of large areas of the Kendrick Project will drain into sumps from which it will never return to the river at all except through the artificial drains constructed by the United States as a part of the project. Consequently on the Special Master's own conclusions, as well as on the analysis of the equities and law as outlined above, the very *least* to which the United States is entitled is permission to divert natural flow to the Kendrick Project in lieu of the return flow thus artificially collected and returned to the river. The United States could rightfully leave that water in the sumps in which case no one ever would have the use of it. Certainly, then, the Kendrick Project is entitled to whatever benefit may result from the artificial return of that water to the stream and recommendation number 5 should be modified so to permit. *Cf. Reno* v. *Richards*, 32 Idaho 1 (1918), in which such an exchange of developed or salvaged water for natural flow was allowed."

"Pertinent to the basic principle involved here is the entire line of cases recognizing the right of one who develops or

X

(Exception XVI)

THE DECREE SHOULD CONTAIN SPECIFIC PROVISION THAT IT DOES NOT AFFECT THE DISTRIBUTION OF STORAGE WATER

Without specific provision that the decree does not affect the distribution of storage water, there may be future conflict in its interpretation. It should be clear, for example, that the acre-foot and second-foot limitations expressed in recommendation 3 (b) are not limitations on storage water uses under the contracts between the United States and water users.

The inclusion in the decree of such a provision is directly consonant with the Special Master's ninth conclusion on page 10 of his report and with his statements in the first paragraph on page 69 of that report.

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salvages water not formerly available for diversion and use to use that water as against prior natural flow appropriators. In that connection see, e. g., *Pomona Land and Water Co.* v. *San Antonio Water Co.*, 152 Cal. 618 (1908); *Wiggins* v. *Muscupiabe Land & Water Co.*, 113 Cal. 182 (1896); *Nampa & Meridian Irr. Dist.* v. *Welch*, 52 Idaho 279 (1932); *Hill* v. *Green*, 47 Idaho 157 (1928); *Basinger* v. *Taylor*, 36 Idaho 591 (1922); *Woodward* v. *Perkins*, 147 P. 2d 1016 (Mont. 1944); *West Side Ditch Co.* v. *Bennett*, 106 Mont. 422 (1938); *State ex rel Zosel* v. *District Court*, 56 Mont. 578 (1919); *Spaulding* v. *Stone*, 46 Mont. 483 (1912); *Smith* v. *Duff*, 39 Mont. 382 (1909). Cf. *Jones* v. *Warmsprings Irr. Dist.*, 162 Ore. 186 (1939). Of these various cases only *Reno* v. *Richards*, cited in the text above, involved an exchange of the developed water for natural flow, but the exchange was there considered as a matter of course so long as it did not interfere with other appropriators.

XI

(Exception XVIII)

THE DECREE SHOULD CONTAIN SPECIFIC PROVISION THAT IT DOES NOT GOVERN OR AFFECT ANY WATER, OR THE RETURN FLOW FROM SUCH WATER, WHICH IN THE FUTURE MAY BE IMPORTED INTO THE NORTH PLATTE BASIN FROM FOREIGN WATERSHEDS

The decree to be entered here apportions the natural flow water of this stream equitably among these sovereign parties. It does so on the basis of the past and present water supply, which is sorely taxed to meet present requirements. If in the future an additional water supply is developed by importation of water into this basin from the watershed of an entirely separate stream, none of the water of which now flows into this basin, that water obviously should not be subject to this apportionment. Depending on the circumstances, it perhaps could not fit into the mechanism of the apportionment recommended. Certainly none of the equities on which this recommended apportionment is based would weigh equally as to such a new supply of water.

Consequently the United States requests that the decree merely contain a provision acknowledging the fact that it does not and will not affect the use of such water or return flows from it. Such a provision will not fix the right among water users to that water or its return flows; it will leave that for proper determination at the

proper time. It will merely exclude such water from this apportionment among states and the United States.

Without such a provision this decree itself may act as a deterrent to future development based on such outside sources of water supply, a deterrent unnecessary to the protection of any party here and undesirable in view of the over-appropriated character of this stream.

XII

(Exception XIX)

THE DECREE SHOULD PROHIBIT THE USE OF STORAGE WATER BY THOSE NOT ENTITLED THERETO BY CONTRACT

This exception is closely related to that discussed in Part X of this argument, which urges inclusion of a provision that the decree does not affect the distribution of storage water. As pointed out there, the Special Master contemplates that storage water be distributed pursuant to the contracts and be not subject to apportionment. Therefore, only those having contracts are entitled to participate in its use.

The prohibition against use of storage water by those not entitled thereto is suggested for inclusion in the decree in line with these conclusions of the Special Master as to storage water and in aid of the orderly and harmonious administration of the water of the stream hereafter.

XIII

(Exception XX)

THE DECREE TO BE ENTERED MUST DEAL WITH ALL SUBJECT MATTERS INCLUDED IN PARAGRAPHS 1-8, BOTH INCLUSIVE, OF THE SPECIAL MASTER'S RECOMMENDATIONS

On page 180 of his report the Special Master suggests that his recommendations are not interdependent and that the rejection of some would not preclude the adoption of others.

The United States agrees that specific recommendations may, in proper circumstances, be modified without requiring the alteration or elimination of others, and submits that the modifications urged in its exceptions illustrate that fact. The United States does except and object, however, to the concept that the subject matter of any of the Special Master's eight specific recommendations could be ignored or eliminated from the decree while other recommendations were adopted by the Court.

The purpose of this litigation is to determine the equitable interests of the parties in the flow of this stream. Such interests can be determined only in relation to each other. And so it is in the recommended apportionment. As is apparent throughout the Special Master's report, the equities of every section of the stream are dependent on the water supplies and the equities

of every other portion of the stream. The recommendations are built squarely on those equities. No one of them can be omitted without disturbing the equitable relationship established by the entire set of recommendations or in a manner consonant with the interrelated underlying equities of the parties. Thus, elimination of recommendations 1 and 2 will affect the storage of water in Pathfinder and Seminoe reservoirs (report, pp. 127–128, 134), the elimination of recommendation 3 would obviously affect flows in the Whalen to Tri-State Dam section, and so on. The maintenance of the equitableness of any portion of the recommended decree is irrevocably dependent on the existence of a complete decree.

XIV

(Exception XXI)

THE SPECIAL MASTER IS IN ERROR IN OMITTING RECOGNITION OF THE FACT THAT, IN WYOMING, STORAGE WATER IS NOT SUBJECT TO THE LIMITATION OF ONE SECOND FOOT OF WATER FOR EACH SEVENTY ACRES OF LAND

On page 15 of his report the Special Master recognizes a limitation on the use of water to one second foot of flow for each seventy acres of land, both in Nebraska and Wyoming. As to Nebraska he also recognizes that that limitation is not applicable to storage water, but he omits such a conclusion as to Wyoming. In that, the United States submits that he errs.

The second foot limitation is contained in section 122–117, Wyo. Rev. Stats. (1931), and reads that "no allotment for the direct use of the natural unstored flow of any stream shall exceed one cubic foot per second for each seventy acres * * *." Section 122–1508 prescribes the limitation on use of storage water to be merely that of beneficial use.

XV

(Exception XXII)

THE TABLE ANALYZING SUPPLY AND REQUIREMENTS IN THE WHALEN TO TRI-STATE DAM SECTION, PAGE 67 OF THE REPORT, IS NOT ACCURATE

The seasonal excesses shown in the last column of Table III, page 67, of the report are not accurate and give an incorrect view of the relationship between supply and demand in the Whalen to Tri-State Dam section of the river.

As appears from the table itself, and its footnotes, no allowances have been made for unusable water entering the section from above Whalen. From the discussion immediately preceding the table it appears to have been assumed that no such unusable water existed since there were no reservoir spills. That, however, does not apply to Guernsey Reservoir. Also the Special Master is using a requirement in the section well below the historical diversions there (report, p. 68), and one which, if enforced historically, might well

have created additional spills with resultant unusable water.

This situation may be exemplified by the Dibble Study to which the Special Master refers at pages 65–66 of his report. That study assumed requirements in the Whalen to Tri-State section 59,000 acre feet per season larger than those used by the Special Master. Report, p. 66. Yet column 49 of U. S. Exhibit 273 shows unusable water entering the Whalen to Tri-State Dam section in the irrigation seasons as follows:[*]

1932—20,500 acre feet
1933—165,900 acre feet

Those values would, of course, be greater under the Special Master's smaller irrigation requirements.

The table also is misleading in that seasonal excesses shown for specific years would, in some part at least, be stored or preserved in the up-river reservoirs for use in later seasons of deficiency, if the reservoirs were operated with demands limited to 1,027,000 acre feet in the Whalen to Tri-State section as assumed in the table.

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[*] For this restricted purpose only column 49 of U. S. Exhibit 273 is included in the printed record submitted and only the testimony necessary to explain that one column is included, it being transcript pages 28703–28704, 28688–28691, referring to U. S. Ex. 271, that testimony being applicable also to U. S. Ex. 273 (Tr. 28741). To reproduce the entire, complete Dibble study and testimony is not, we believe, warranted or necessary for this purpose.

The effect of these deficiencies in the table cannot be translated into acre-foot values. It can only be said that the table is not accurate or dependable as it stands.

XVI

(Exception XXIII)

THE PERCENTAGES SHOWN IN COLUMN 2 OF TABLE XV, PAGE 81 OF THE REPORT, ARE NOT THE TRUEST INDEX OF THE ADEQUACY OF THE SUPPLY FOR CANALS IN THE WHALEN TO TRI-STATE DAM SECTION

On page 80 of the report the Special Master concludes that the percentages shown in column 2 of Table XV, on page 81 of the report, are the truest index of the adequacy of the supply for canals in the Whalen to Tri-State Dam section. Those percentages indicate the adequacy of the historical supply in the May-September period after the elimination of all excess water taken historically by the various canals.

The United States points out, as is apparent from the percentages shown in column 1, that the excess water taken by some canals was taken at the expense of other canals suffering a deficiency. Therefore, elimination of those excesses from consideration in column 2 gives a distorted picture, for in practical fact had the excesses been denied to the canals which had them, that water would have gone to reduce the deficiencies of other canals, whereas column 2 makes no allowance for such deductions.

It is also pointed out that the elements of non-irrigation season diversions included in the values shown in columns 3 and 4 are significant. Non-irrigation season water may, of course, contribute to crop production through direct application to early or late crops or through contributions to ground water which subsequently is fed upon by crops during the regular season.

All of these elements must be weighed and no one column in Table XV can be said to be controlling. The United States submits, however, that column 1, not column 2, is the "truest" index of the adequacy of supply for the section as a whole.

XVII

(Exception XXIV)

THE NATURAL FLOW RIGHT OF THE NORTHPORT CANAL SHOULD BE RECOGNIZED FOR 186 SECOND-FEET RATHER THAN 65 SECOND-FEET

In Table XVII, on pages 86–87 of the report, the Special Master shows a second-foot allowance of 65 for the Northport Canal, footnote 3 indicating that that allowance is the amount necessary to serve only the acreage under that canal which will not be served by return flow intercepted and transported for Northport by the Tri-State Canal. Return flow, however, is not a steady thing throughout the irrigation season. It varies from a very small amount at the beginning of the season to a sizeable amount later in the season

when the returns from that summer's irrigation are more pronounced. United States Exhibit 268 (Tr. 28644–28648) shows that for the seven years of best run-off in the 1930–1940 decade, the average return flow intercepted by Tri-State on May 1 was only about 23 second-feet, that it averaged only 43.9 second-feet for the whole month of May and that it did not hit its peak of 200 second-feet until the very end of the season on September 30.

The consequence of those facts is, of course, that Northport can irrigate almost none of its acreage from return flow in the early season, but can irrigate all of it from that source at the end of the season. The seasonal allowance in acre feet as set up in Table XVII is acceptable in these circumstances, but the day-by-day second-foot allowance is not. If Northport is to irrigate in the early season, as obviously it is entitled to, it must be allowed use of substantially the full number of second feet required to meet the needs of its full acreage, 186 second feet as shown in Table XXVI on page 253 of the report.

The United States, therefore, submits that the Northport Canal must be recognized as entitled to 186 second feet, with the proviso that that allowance be subject to reduction by the amount of return flow intercepted by the Tri-State Canal for delivery to Northport at any given point of time.

CONCLUSION

For these various reasons the United States believes and urges that all of its exceptions should be approved by the Court and that the decree to be entered in this case should be in conformity therewith.

Respectfully submitted,

CHARLES FAHY,
Solicitor General,
J. EDWARD WILLIAMS,
Acting Head, Lands Division,
FREDERIC L. KIRGIS,
Special Assistant to the Attorney General,
WALTER H. WILLIAMS,
Attorney,
Department of Justice.
WILLIAM J. BURKE,
Regional Counsel, Bureau of Reclamation.

JANUARY 1945.

APPENDIX I

No. 6467

UNITED STATES OF AMERICA

[SEAL]

THE NATIONAL ARCHIVES

To All to Whom These Presents Shall Come, Greeting:

I certify that the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

Miscellaneous Letters Received, 1903–27758.

This document is from the records of the General Land office.

In testimony whereof, I Solon J. Buck, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief or Acting Chief of the General Reference Division of the National Archives, in the District of Columbia, this 5th day of January 1945.

[SEAL] (S) SOLON J. BUCK,
Archivist of the United States.
By (S) W. NEIL FRANKLIN,
Chief, General Reference Division.

NA 42 (7-44) (7-1-2)

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L. & R. R. Div. A. M.

DEPARTMENT OF THE INTERIOR
WASHINGTON

FEBRUARY 11, 1903.

The Commissioner of the General Land Office.

SIR: In a letter of the 6th instant to the Department the Director of the Geological Survey recommended that the public lands in certain designated townships in Wyoming be withdrawn from entry, except under the homestead laws, under the provisions of the act of June 17, 1902, 32 Stat. 388.

I enclose a copy of the letter for your information and hereby direct the temporary withdrawal of the public lands in the townships described in the letter from settlement, entry or other form of disposition under the public-land laws, except the homestead laws. All lands entered and entries made under the homestead laws within the limits of this withdrawal, during its continuance, shall be subject to all the provisions, limitations, charges, terms and conditions of the act mentioned.

This withdrawal is made in connection with the North Platte River Survey, Wyoming.

Very respectfully,

(S) E. A. HITCHCOCK,
Secretary.

No. 6466

UNITED STATES OF AMERICA

[SEAL]

THE NATIONAL ARCHIVES

To all to whom these presents shall come, greeting:

I certify that the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

Lands and Railroads Division, Letters Received, 1903–748.

This document is from the records of the Office of the Secretary of the Interior.

In testimony whereof, I, Solon J. Buck, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief or Acting Chief of the General Reference Division of the National Archives, in the District of Columbia, this 5th day of January 1945.

[SEAL] (S) SOLON J. BUCK,
Archivist of the United States.
(S) W. NEIL FRANKLIN,
Chief, General Reference Division.

NA 42 (7–44) (7–1–2)

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In reply FHN and date of this letter.
1903.
Subject: Request for withdrawal in Wyoming.
MB

Address all Communications to
"Director, U. S. Geological Survey,
Washington, D. C."

DEPARTMENT OF THE INTERIOR

UNITED STATES GEOLOGICAL SURVEY

WASHINGTON, D. C., *Feb. 6, 1903.*

The Honorable
The SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: As a result of preliminary investigations in the field during the past season, I have the honor to request the withdrawal from entry, except homesteads, as provided by the act of June 17, 1902 (32 Stat. 388) of the public lands in the following townships:

North Platte Survey, Wyo.

Township 21 N., Ranges 60, 61, and 62 W.
Township 22 N., Ranges 60, 61, 62, and 63 W.
Township 23 N., Ranges 60, 61, 62, 63, 64, and 65 W.
Township 24 N., Ranges 60, 61, 62, 63, 64, and 65 W.
Township 25 N., Ranges 60, 61, 62, 63, 64, and 65 W.

Township 26 N., Ranges 63, 64, 65, and 66 W.
Township 27 N., Ranges 66 and 67 W.
Township 28 N., Ranges 67 and 68 W.
Township 29 N., Ranges 67 and 68 W.
Township 30 N., Ranges 68, 69, 82 and 83 W.
Township 31 N., Ranges 68, 69, 70, 71, 72 and 82 W.
Township 32 N., Ranges 70, 71, 72, 81 and 82 W.
Township 33 N., Ranges 71 to 81 W., inclusive.
Township 34 N., Ranges 71 to 80 W., inclusive.
Township 35 N., Ranges 72 to 77 W., inclusive.

It is the intention to make a careful examination of these lands and the drainage area of the North Platte River during the coming season in order to obtain further information concerning the feasibility of irrigating the lands in question.

Very respectfully,

(S.) CHAS. D. WALCOTT,
Director.

EDW.

APPENDIX II

Section 4 of the Reclamation Act (32 Stat. 389, 43 U. S. C. sec. 461) authorizes and requires the Secretary to determine charges which shall be made against project water users and provides that those "charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project." Wyoming law, however, provides that in certain circumstances the owner of a canal or reservoir furnishing water for the use of others cannot receive any "royalty" for the use of the water but is to be considered a common carrier and shall be subject to the state law controlling common carriers, including control of their charges (Wyo. Rev. Stats. (1931) Sec. 122–421). Nebraska enacted a law in 1919 that the owner or operator of storage or diversion works shall deliver water at reasonable rates to be fixed by state authority (Nebr. Comp. Stats. (1929) Sec. 46–627). If applied to the United States, both of these statutes would preclude performance by the Secretary of his function under Section 4 of the Reclamation Act.

Section 5 of the Reclamation Act (32 Stat. 389, 43 U. S. C. sec. 431), in dealing with the furnishing of water from Government projects to lands in private ownership, provides that no "right to the use of water for land in private ownership shall be sold" in certain circumstances

and that "no such right shall permanently attach until all payments therefor are made." Obviously Congress contemplated that the water right rested in the United States and that a "right to the use of water" was subject to disposition or sale by it, and intended that the water right should remain in the United States at least until final payment of the purchase price was made. This not only demonstrates the intent of Congress to retain title, but also shows another departure from the law as recognized by most western states: i. e., that water rights acquired from the states vest at the time of beneficial use (although they may be validly initiated theretofore). The inconsistency of this provision with any possible construction of Section 8 as embodying an abandonment of Federal title is total and striking (*Cf. Mower* v. *Bond,* 8 F. 2d 518 (S. D. Idaho)).

By subsequent acts, amendatory of or supplemental to the Reclamation Act, Congress has repeatedly exercised control over the water of reclamation projects and has, in that and other ways, evidenced its understanding that Government ownership of the rights in these waters persists. This later legislation is inconsistent with a construction of Section 8 as an abdication of Federal rights or control.[1] It is familiar doctrine, of

[1] These later enactments, and the Reclamation Act itself (particularly sections 5 and 8), are also inconsistent with any interpretation of the Acts of 1866, 1870, and 1877, of the fact of admission to the Union of new states, or of the legislative or constitutional provisions of those new states, as divesting the United States of rights in the non-navigable waters of the public domain.

course, that action of the Congress is properly to be interpreted in the light of subsequent legislation on the same subject. (See *Tiger v. Western Investment Co.*, 221 U. S. 286, 309.)

The Act of February 24, 1911, c. 155, 36 Stat. 930, 43 U. S. C. sec. 522, authorizes the Secretary to lease the surplus power privileges developed on a reclamation project. The Act of February 25, 1920, c. 86, 41 Stat. 451, 43 U. S. C. sec. 521, authorizes the Secretary, in connection with his operations under the reclamation law, to enter into contracts to supply water for other purposes than irrigation and on "such conditions of delivery, use, and payment as he may deem proper." In neither of these acts did Congress evidence any concern for the laws of the various states prescribing the priority of various uses of water. Both Wyoming and Nebraska provide that water rights used for power development can be condemned by anyone for use for irrigation (Wyo. Rev. Stats. (1931) Sec. 122-402; Nebr. Const., Art. XV, sec. 6). There is also direct conflict with some state laws dealing specifically with power privileges, such as that of Nebraska which requires the lease of water from the state and the payment of a license fee in connection with any hydroelectric project (Comp. Stats. Nebr. (1929) Sec. 81-6318). These enactments also embody a lack of recognition of rights which may be created under state law subsequent to the initiation of the reclamation project but prior to the authorized action of the Secretary in leasing the power privilege or in contracting to supply water for purposes other than irrigation "on such con-

ditions of delivery, use and payment as he may deem proper" without regard to state law.

The Act of February 21, 1911, c. 141, 36 Stat. 925, 43 U. S. C. sec. 523, provides that when a project constructed under the Reclamation Act has excess storage and carrying capacity, the Secretary may contract with private individuals for the storage and carriage of water, the charges to be fixed by the Secretary. The Wyoming law vests in the state the power to fix charges for such services. Wyo. Rev. Stats. (1931) 122–421. Furthermore, this federal statute is referred to in Subsec. J, Sec. 4, of the Act of December 5, 1924, c. 4, 43 Stat. 672, 703, 43 U. S. C. sec. 523, where it is termed the "Warren Act" and where reference is made to "the sale or rental of surplus water under the Warren Act."[2] Obviously the United States cannot sell or rent water which it does not own.

Section 8 of the Reclamation Act, as before noted, made water rights appurtenant to the land irrigated. Certain lands to which water rights thus became appurtenant were later found to be unproductive. The Act of May 25, 1926, c. 383, 44 Stat. 636, 647, 43 U. S. C. sec. 423, provided that water rights formerly appurtenant to such lands shall be disposed of "by the United States under the reclamation law" and that any surplus water temporarily available may be furnished on a rental basis for use on lands excluded from the

[2] Technically the Warren Act does not provide for sale or rental of water, as such, but this Congressional reference to sale or rental under the Warren Act indicates an understanding of Federal ownership and control.

project because of their unproductivity, the rental to be on the terms and conditions approved by the Secretary of the Interior. Here again there is an assumption of Federal ownership and control. The Wyoming law provides that direct flow rights cannot be detached from the lands for which they were acquired except on penalty of loss of priority, a penalty obviously not contemplated by the Congress (Wyo. Rev. Stats. (1931) Sec. 122–401).

Practically all of these powers granted by Congress to the Secretary are contrary to and would be seriously impaired by application of two additional Wyoming statutes, one requiring reservoir owners to supply any surplus water to anyone who wants and can use it at terms to be fixed by state authority (Wyo. Rev. Stats. (1931) Sec. 122–1605) and one authorizing the state engineer to prevent the use of water stored in Wyoming on lands outside of that State, as is the situation on the North Platte Project (Wyo. Rev. Stats. (1931) Sec. 122–1601).

There are also numerous other enactments by Congress dealing with the water of reclamation projects founded on the assumption of Government ownership and control, prescribing rules for the use and disposition of project water without regard to state law and in many instances contrary to state law. Those statutes are merely listed hereafter with little or no comment, their basic inconsistency with the concept of state control being apparent.

Sec. 4 of Act of April 16, 1906 (34 Stat. 116, 43 U. S. C. sec. 567). The Secretary of the In-

terior is authorized to contract with the proper authorities of towns or cities to provide "for water rights in amount he may deem necessary," which town shall then acquire "a water right from the same source as that of said project."

Act of June 25, 1910 (36 Stat. 835, 43 U. S. C. sec. 397). Section 1 of this Act authorizes the advancement of $20,000,000 to the Reclamation Fund, said sum to be expended in the completing of projects previously undertaken or "to protect water rights pertaining thereto claimed by the United States."

Sec. 3 of Act of August 9, 1912 (37 Stat. 265, 266, 43 U. S. C. secs. 543, 544). Prohibits the furnishing of water for land in single ownership in excess of 160 acres and prohibits the sale of water to lands in excess of that amount in the single ownership.

Act of August 13, 1914 (*38 Stat. 686*).

Sec. 3 (43 U. S. C. secs. 478, 480, 481). The Secretary of the Interior is authorized to cancel water right applications (and thereby the right to receive water) where the landowner is more than one year in default in payment of the construction charges.

Sec. 6 (43 U. S. C. secs. 493, 494, 495, 479, 496 and 497). The Secretary of the Interior is authorized to cancel water right applications for default of more than one year in payment of operation and maintenance charges.

Sec. 8 (43 U. S. C. sec. 440). The Secretary of the Interior is authorized to make "general rules and regulations governing the use of water in the irrigation of the lands within any project"

and is authorized to require any water right applicant to reclaim one-fourth of the irrigable area covered by his application within three seasons, and one-half within five seasons, failure in which shall render the water right application (and the right to receive and use water) subject to cancellation.

Sec. 46, Act of May 25, 1926 (44 Stat. 636, 649, 43 U. S. C., sec. 423e). In connection with a requirement that owners of project lands disclose the consideration received in connection with any conveyance of lands within the project area by them, the Secretary of the Interior is authorized to cancel the water rights attaching to the remaining lands of the owner as a penalty for any falsification or concealment of the true consideration received by him in the sale of his other lands.

Act of June 18, 1934 (48 Stat. 980). This Act authorizes the Secretary of the Interior to convey to the King Hill Irrigation District all the interest of the United States in the King Hill project and authorizes him, in that connection, to quitclaim "all the right, title, interest and estate of the United States in or to said King Hill Reclamation project, including the water rights thereof and any real estate acquired or held by the United States in connection therewith."

Act of August 4, 1939 (53 Stat. 1187).

Sec. 2 (d) (43 U. S. C., sec. 485a). This section makes reference to moneys payable for water rental.

Sec. 6 (43 U. S. C., sec. 485e). This section authorizes the Secretary of the Interior, in any repayment contract to require such provisions as

he deems proper to protect project lands against deterioration due to improper use of water; provides that any such contract shall require that no water be delivered "to lands or parties" in arrears in the advance payment of operation and maintenance charges or "toll charges" or in arrears more than twelve months in the payment of construction charges due to the United States or to the organization (irrigation district, etc.) in which the lands or parties are included in such an organization which itself is in arrears in its obligations to the United States for operation and maintenance or construction charges.

Sec. 7 (b) (43 U. S. C. sec. 485f). This section authorizes delivery of water for a "toll charge" during the development period on a project and provides that continued delivery of water, after the development period, be conditioned on the execution of a repayment contract.

Sec. 9 (a) (43 U. S. C. sec. 485h). This section requires, prior to construction of a project in the absence of specific Congressional authorization, a finding of (1) engineering feasibility, (2) economic feasibility in that the estimated cost will be met by repayment by water users, by power revenues, by returns from users of municipal water supply and other miscellaneous purposes and by the allocation to flood control or navigation. [This contemplates an ability on the part of the Secretary in the operation of the project to use waters as necessary to produce the revenues here provided.]

Sec. 9 (b) (43 U. S. C. sec. 485h). This section directs that the Secretary, where there is an

allocation of cost to flood control or navigation, shall operate the project for those purposes to the extent justified by the allocation therefor.

Sec. 9 (c) (43 U. S. C. sec. 485h). This section contains references to the authority of the Secretary of the Interior to furnish water to municipalities and for miscellaneous purposes, to lease power privileges and specifies preferences to be granted in "sales or leases" to municipal and other public corporations or agencies.

Sec. 9 (d) (43 U. S. C. sec. 485h). This section provides that no water may be delivered under a new project or a new division of a project until an organization has entered into a repayment contract satisfactory in form to the Secretary, providing among other things: (1) for temporary delivery of water on a per acre-foot per annum charge; (2) for repayment of construction charges allocated to irrigation; and (3) for delivery of water only on a toll charge basis prior to announcement by the Secretary that works are completed to supply substantially all of the lands of the project.

Sec. 9 (e) (43 U. S. C. sec. 485h). This section provides for short and long term contracts to furnish water for irrigation purposes, no such contract to exceed forty years.

Sec. 14 (43 U. S. C. sec. 389). This section authorizes the Secretary of the Interior, for purposes of orderly and economical construction or operation and maintenance of projects, to enter into "such contracts for exchange or replacement of water, water rights, or electric energy or for the adjustment of water rights, as in his judg-

ment are necessary and in the interests of the United States and the project."

Interior Department Appropriation Act for Fiscal Year, 1939 (Act of May 9, 1938, 52 Stat. 291, 321). The Secretary of the Interior is authorized to "furnish" water for use of the Arizona State Experimental Farm as described, together with such areas as may be added thereto.

General Provisions of the Interior Department Appropriation Acts. No sums appropriated for operation and maintenance can be used to irrigate *any* lands in a district which is in arrears more than twelve months in the payment of any charges due the United States and, similarly, no water shall be delivered to any lands which themselves are in arrears in payments. See Interior Department Appropriation Acts for fiscal years 1938 (50 Stat. 564, 592), 1939 (52 Stat. 291, 319), 1940 (53 Stat. 685, 714), 1941 (54 Stat. 406, 433), 1942 (55 Stat. 303, 331–332), 1943 (56 Stat. 506, 532) and 1944 (57 Stat. 451, 472–473).

APPENDIX III

PART A

In the United States District Court for the District of Nevada

UNITED STATES

v.

ORR WATER DITCH COMPANY, ET AL., No. A–3

MASTER'S REPORT—GOVERNMENT OWNERSHIP STATE CONTROL

The territory now comprising the State of Nevada was ceded to the United States upon the close of the Mexican War by the treaty of Guadelupe-Hidalgo on Feb. 2, 1848, which dated the cession from July 2, 1847, the day Commodore Sloat raised the flag at Monterey.

The Truckee River, the rights to the water of which and its tributaries are at issue in this case, runs out of Lake Tahoe, and after receiving water from Donner Lake, the site of the tragedy of the Donner Party, in 1846, and from other lakes and streams, flows into and supplies Pyramid Lake.

Coming by way of Oregon, General Fremont discovered Pyramid Lake, January 10, 1844, and so named it because of the island that rises in the lake and resembles the great Cheops. On the night of January 15th he camped at the mouth of the Truckee River which he called Salmon Trout River.

On May 20th of that year an emigrant train left Council Bluffs and journeyed westward on the Oregon Trail which was then open. En route Martin Murphy and five sons and seventeen other men with this train formed a desire to go to California, and the others wished to continue to Oregon. For some days a new captain was selected nightly. Finally the Murphy party separated from the emigrant train this side of the Rocky Mountains and came by Thousand Springs Valley to the headwaters of the Humboldt River and traveled down that stream. Near Battle Mountain they found a friendly Indian who was willing to guide them. They took him with them until they reached the sink of the Humboldt River. There they were greatly disappointed because they had believed that the river would run to the Pacific Ocean and furnish water for their journey. After maps were drawn on the sand and explanations made the good Indian showed them to the Truckee River near Wadsworth. They had named him from a French-Canadian guide with the emigrant train on the Oregon Trail, and when he brought them to the river they gave it the same name. With slight change from the name of the guide it has since been known as the Truckee River. General Fremont called Lake Tahoe, Lake Bonpland in honor of the great scientist friend of Humboldt. At one time it bore the name of Bigler, but it could not escape the Indian name which it bears. It is one of the great mountain lakes of the world. Its beauties have been described by George Wharton James in his book, "The Lake of the Sky," and by numerous

other writers. It was mentioned by Mark Twain in two of his books.

The melting snows in the high Sierra-Nevada mountains and canyons feed this and other lakes and tributaries which supply the Truckee River with the water which is used for power, irrigation, municipal and domestic purposes, and is the great source of wealth in its locality.

After the discovery of gold by Marshall at Sutter Creek in 1848 the rush to California began in 1849. For ten years thousands of travelers on their way to the placer mines, after crossing wide deserts, passed along the Truckee River by the present site of the City of Reno and were gladdened by the pure water for themselves and animals, without one of them stopping to appropriate for homes, agricultural or other purposes, the water or land which was free for the taking and has since become worth millions of dollars. Under a generous government the great natural resources of a new country, the mines with precious metals, the timber of virgin forests, the land, the water, were free to the first occupants. With settlement and growth of population the irrigated lands and use of water have increased until there is not enough to fully supply in dry years the needs of all users without storage. Now the necessity of determining rights and priorities, so that the earlier appropriators may be supplied first when there is not enough water for all, arises and we are confronted by a dispute as to whether the government or the state owns the water.

It must be conceded that the United States owned the water after the cession from Mexico,

and while the land was a part of Utah territory and later Nevada territory after its organization in 1861. By what act of legislation, in what way, if any, has the government parted with its ownership of the water which it obtained with the land sixteen years prior to the time the state was organized? Every right, title, and condition once shown to exist is presumed to continue until there is some evidence of transfer or change. Ownership can be conveyed only by the owner, or by prescription which does not run against the government, or by conquest or force which is impossible against the United States. In Congress as the sole legislative agency of the sovereign people of the nation lies the only power for making disposal of the public domain, or government ownership in water or other property. The awarding of the water to the state by the court, if unauthorized by Congress would be unwarranted judicial legislation. Has Congress ever transferred the water to the state?

At the time the country was ceded by Mexico the water was obtained with it as part of the land. In the general objections filed on behalf of the defendants and over the citation of cases it is said "a water right is real property in the strictest sense of the word." The authorities from Blackstone to the latest decisions agree that water is real estate. Sixteen years after the United States acquired the land and water the constitution of the State of Nevada was adopted with the same provisions as the Enabling Act "That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the

unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposal of the United States."

This was an express reservation to the government of the land and with it the water which was as much a part of the land as the minerals and the timber. This reservation appears to have been more precautionary than necessary because Congress had not authorized any transfer or conveyance of the water to the state.

Solicitors for defendants have placed special reliance upon the following provisions in the act of Congress of July 26, 1866:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed.

If the state owned the water from the time of its organization Congress could not legislate regarding its ownership or control by this act passed two years after statehood. If the government owned the water Congress had jurisdiction over and could have conveyed the water to the state. Instead of doing this it provided that whenever by prior possession rights to the use of water had accrued and become vested under

local customs, laws and decisions owners of such vested rights should be maintained and protected in the same. This was in effect a grant to the appropriators and not to the state of the water which they had appropriated without permission of the owner, the United States. By the word "whenever" continuing appropriations were allowed to be made so long as the act remained in force or the water was not withdrawn or reserved by the government; but there was no grant to the state of the unappropriated nor of the appropriated water. The grant was only to the use of the water for prior possessors and appropriators, past and future, in accordance with local customs, laws, and decisions which meant state or local control. There was nothing in the act conveying or authorizing conveyance of the unappropriated waters to anyone or in any way except that whenever by prior possession rights to the use of water became vested and accrued the possessors or owners of such vested rights should be maintained and protected under the customs, laws and decisions of the courts. Federal statutes or general laws could not so well meet the varying conditions and necessities in different parts of the country, and Congress generously donated to the appropriators the water belonging to the United States for the appropriations made, and to be made, and wisely provided for local or state control.

The provisions of the later acts of Congress, including the one of July 9, 1870, making by section seventeen thereof patents for homesteads or preemptions subject to accrued water rights, which may have been acquired under the ninth

section of the act of 1866; and the act of March 3, 1891, amending the Desert Land Act and providing that the privilege granted should not be construed to interfere with the control of water for irrigation or other purposes under the authority of the respective states, contain no language indicating conveyance or transfer of the water from the government to the state. In these and other acts Congress continued to assume control and government ownership and to pursue the policy initiated by the Act of 1866, and was careful to guard the appropriations or rights which had accrued under local laws. This is especially apparent in the following language of the Desert Land Act of March 3, 1877:

> *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

This provision as well as other statutes was subject to repeal or amendment, or the reservation or withdrawal of the water from appropriation by act of Congress later.

Section 8 of the act of June 17, 1902 known as the Reclamation Act provides:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

The legislature promptly adopted and enacted into the state statute the provisions of the last sentence of this section. By this act Congress again assumed that the government owned the unappropriated water and continued the policy of leaving the control of the appropriated waters to the states and carefully provided that nothing in the act should affect any right of any state or of the federal government or any appropriator or user of water in, to, or from any interestate stream.

All of the different acts of Congress recognize and confirm the right of appropriators of water for beneficial purposes and authorize the control

of these rights in accordance with state and local laws and regulations. No doubt, the state could acquire rights by appropriation of unappropriated or unreserved water for power, irrigation, storage, or other beneficial purposes, as well as an individual or company.

The early decisions of the Nevada Supreme Court written by Justice Whitman and Chief Justice Lewis and the one in *Union Mill and Mining Co.* v. *Ferris* (2 Sawyer, 176) insofar as they hold that the water is part of the land, that Congress alone can dispose of the title to the water and that no state law can defeat it stand unreversed (*Rio Grande Dam Case*, 174 U. S.). On the basis that both belonged to the United States, Congress by the act of 1866 legislated as freely regarding the water as the mineral lands. The "Nevada Act of February 13, 1867 was a recognition by the legislature of the state of the validity of the claim made by the government of the United States to the mineral lands" (*Heydenfeldt* v. *Daney Mining Co.*, 93 U. S., 10 Nevada, 314).

As the defendants' water rights are a grant from the government with special provisions for their control by the states, the defendants own and are protected in their rights or appropriations the same and as fully as if they had been acquired from the state.

The federal courts are supreme in the construction of the act of Congress and have assured state control. The construction of a state statute by the State Supreme Court is conclusive, and is followed by the federal courts including the Supreme Court of the United States.

The idea that by this suit the defendants are deprived of anything which would be afforded them by the state law is a misconception.

The question as to whether the state owns the water is important to the government, but does not affect or vary the defendants' vested rights in the least. To the defendants the question whether the state or the government owns the water is as immaterial as one would be as to whether the state or government owns the unappropriated public domain from which the defendants in some instances obtained patents for their lands directly from the government, while in others they obtained patents from the state after the grant of the land by the government to the state. By the act of 1866 the government adopted the local laws and decisions in regard to the initiation and control of water rights and they are as complete as they would be if Congress had conveyed the water to the state previous to their inception or had directly enacted the state statute. As held by the Supreme Court of the United States and other courts these rights as conferred and vested by the state laws are allowed and confirmed and protected by the federal courts the same as by the state courts, and as freely as they could be if the state owned the unappropriated water.

The provision in the Reclamation Act directing the Secretary of the Interior to proceed in conformity with the state laws relating to control, use, and distribution of water used in irrigation, or any vested right acquired thereto, means that the Secretary shall observe the state laws in re-

gard to accrued rights, but did not constitute a grant to the state, and did not mean that the Secretary should comply with any state law when reserving or withdrawing for reclamation projects unappropriated water owned by the government. In fact, there are no state laws attempting to regulate the withdrawal or control by the government of its unappropriated water. The statement in the act that nothing therein affected any right of the government, assumed government ownership of the unappropriated water and left that right as complete as it was before the passage of the act.

All of these federal acts are on the basis of government ownership. It could have been only with the understanding that the government owned the water that Congress legislated for the protection of the rights, which by the act of 1866 it had authorized to be acquired in accordance with local customs and state laws and for the regulation of the use of water under the Reclamation Act. There is nothing in these acts or in any act of Congress indicating an intention to convey to the state the water belonging to the United States. It is claimed that the act of 1866 had that effect. Scrutiny and analysis of the act fails to disclose such a purpose. It is as far from conveying the water to the state as it is from conveying to the state the mines and the public domain, on which the act allows rights of way and appropriations of mineral lands to be made. It confirms rights to water which "have vested and accrued, or have been acquired, under local customs, laws and decisions." It declares that the

mineral lands of the public domain are free to exploration and occupation subject to regulations prescribed by law and local customs.

The government is as free to reserve or withdraw at any time the unappropriated water as it is the unappropriated part of the public domain, portions of which it has withdrawn at will for military and Indian reservations, forest reserves, petroleum and oil reserves, and other purposes. The allowance of free appropriations or gifts of water for power, irrigation, or other purposes, or of part of the public domain for grazing, homesteads and mining locations is not a conveyance to the state. The fact that the people have been allowed to benefit to the extent of billions of dollars by free use of ranges for livestock, mineral lands, timber, and water for irrigation, power, and other purposes does not prevent the government from reserving any of its unappropriated water, land, or resources. The government may, at its pleasure, discontinue the privileges enjoyed by citizens of making free appropriations of property belonging to the United States. The unappropriated water as well as any part of the unappropriated domain may be withdrawn at any time from further appropriation. The rights of defendants have accrued and become vested only to the appropriated part of the water leaving the remainder subject to reservation and disposal by the United States. After the defendants claimed and were allowed their water rights under the act of Congress of 1866 it would be inconsistent to hold that the state and not the government owns the water.

It is also contended that upon the organization of the state it became the owner of the water. But does mere assumption of statehood convey to the state water owned by the government, with, or regardless of, the provision in the state constitution that the public domain is expressly reserved to the United States except small portions granted the state for specific purposes? Without Congressional authorization it was as impossible for the state to become the owner of the water as of the land or other government property by the mere fact of assuming statehood. It has been argued that the admission of the state into the union on equal standing with the original states conveyed the right to the water. There is no more reason to infer that such admission conveyed the water than there is to conclude that it granted the lands, government reservations, and other properties to the state. If the state had owned the water previous to statehood as did the thirteen colonies and as Texas did it would continue to own the water after statehood, and the water would not belong to the government because it had never been conveyed to or belonged to the government. The admission was on equal terms politically and as far as state rights and privileges are conferred by the federal constitution, but without reference to the state acquiring water or an equal amount of property with other states. The parent government may give to or withhold from the child upon assuming statehood as much or as little of the water or public domain as it may desire. Lands were given to the state for the State Prison, irrigation and school purposes. The statement in the

Declaration of Independence that all men are created equal, does not mean that they are equal mentally, physically, or have any right of conveyance to them of an equal amount or similar kind of property. It means that they have equal rights and privileges for participation in government, for using their own capabilities, for enjoying life and liberty, for acquiring and possessing property, and pursuing and obtaining safety and happiness.

Senator Newlands, who had been instrumental in securing the passage by Congress of the Reclamation Act of June 17, 1902, drew, and hastened at the first opportunity to have the state legislature pass, the act of 1903 providing for a State Engineer, for the measurement of water rights and for cooperation of the state with the Secretary of the Interior in the work relating to the Truckee-Carson Project.

The Act of 1903 provided:

> All natural water courses and natural lakes, and the waters thereof which are not held in private ownership, belong to the public and are subject to appropriation for beneficial use.

Acts of the legislature of 1899 and 1907 declared that:

> All natural water courses and natural lakes, and the waters thereof which are not held in private ownership belong to the state.

Section I of the act of March 22, 1913 states:

> The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground belongs to the public.

Water not held in private ownership was declared by the act of 1899 to be subject to regulation and control by the state, and by the acts of 1903, 1907, and 1913 to appropriation for beneficial uses.

With local control always existing, first with acquiescence and later by confirmation under the act of Congress of 1866, the legislature of a later generation may have believed that the water belonged to the state. Instead of so stating it would have been more accurate to have declared that the water not held in private ownership was subject to appropriation and use by the public as allowed by the act of Congress. The earlier acts of the state legislature, including the one of 1866 providing rights of way for ditches, and the one passed in the very dry year of 1889 requiring appropriators to record their ditches and statements of their claims, and which was repealed by the succeeding legislature, made no assertion of state ownership. With full power of control of the waters appropriated and of the methods of appropriation the state could not acquire by legislative declaration the ownership of the unappropriated water which belonged to the United States. If there be any doubt as to whether the decision of the Supreme Court of the United States in the Rio Grande Dam and Irrigation case is conclusive, ordinary fundamental principles sustain the continued ownership of the Government to the water as acquired with the public domain by discovery, conquest or treaty. Declarations by the state legislature that the water belongs to the state are as futile and ineffective in conveying title as

would be a state statute declaring that the timber or grasses or mineral lands or reservations on the public domain or the postoffice building belonged to the state.

In *Wieland, State Engineer,* v. *Pioneer Irrigation Company* the United States Supreme Court denied the claim to the water of an interstate stream based on the declaration in the Constitution and laws of the State of Colorado that the water was the property of the public. The court held the state line made no difference and decreed the water to the prior appropriator and not to the State.

Decisions concerning tide water and inland navigable water bear on different questions than those which are pertinent to the water diverted by the defendants for irrigation and other purposes.

By authorization of Congress the rights of appropriators of water are initiated under and are controlled by local and state laws and regulations only, while the rights of appropriators of the public domain for lode and placer mining claims are initiated and governed by the federal statutes supplemented and aided by state laws and local regulations which must not be in conflict with the federal statutes.

Conditioned that additional aid be provided by the state for settlers Congress at the close of its last session made an initial appropriation of a half million dollars for beginning construction of the Spanish Spring Valley reservoir near the City of Reno, the estimated cost of which is over four million dollars. For this and other purposes,

such as the much larger one proposed for damming the Colorado River at Boulder or Black Canyon so as to impound for power and irrigation large amounts of the flood waters which now do damage, are based on the right of the government to divert, store and use the unappropriated or surplus water without injury to owners of vested rights or dimunition of the supply for their beneficial needs. The Government has expended seven million dollars for constructing works and supplying water for users under the Newlands Project.

In taking and using the unappropriated water for these great enterprises for the benefit of the nation and states no prior appropriator is deprived of the water necessary for his uses, and the government has a free hand and cannot be required to make applications and pay charges to, or obtain permits from, the State Engineer, or be hampered by state regulations which apply to the proper initiation and control of water rights by individuals.

Part B

Temporary Restraining Order

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was found and ordered as follows, viz:

In accordance with the findings of the Special Master, George F. Talbot, which are approved temporarily and until further consideration by, and further order of, the Court (except as disallowed or modified by disallowances or modifications thereof made by the Court, and in that

regard in accordance with these disallowances and modifications), the parties, persons, corporations, intervenors, grantors, successors in interest and substituted parties above and hereinafter named are, and each of them is, as against every other one, hereby entitled and allowed to divert and use, until the further order of the Court, from the Truckee River and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplying the people living in cities and towns, for storage and reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed. * * *

DERBY DAM AND TRUCKEE CANAL

CLAIM No 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in the SW1/4 of Section 19, in T. 20 N., R.

23, E. Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government had expended for this project $6,252,000.00. The lands so withdrawn for reclamation are naturally dry and arid and without the application of water are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights, permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

PART C

In the District Court of the United States in and for the District of Nevada

In Equity, Docket No. A-3

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

ORR WATER DITCH COMPANY, ET. AL., DEFENDANTS

FINAL DECREE

[Filed Sept. 8th, 1944. O. E. Benham, Clerk.]

This cause having been heretofore heard by the Court and, following argument by counsel, the matter having been referred to George F. Talbot, as Special Master, and the said Special Master having thereafter rendered his report and made his findings, and the same having been approved and adopted by the Court (except as disallowed or modified by the Court) by a certain order termed "Temporary Restraining Order" made and entered in said cause under date of February 13, 1926:

Now, therefore, in accordance therewith, it is hereby ordered, adjudged, and decreed as follows:

That the parties, persons, corporations, intervenors, grantees, successors in interest and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights hereinafter specified and set forth and entitled and allowed to divert and use, from

the Truckee River and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplying the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed.

Truckee River Diversions

Government Rights

INDIAN DITCH

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848 and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through the Indian Ditch, the intake of which is on the left bank of the river in Section 18, T. 22 N., R. 24 E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount not exceeding 14,742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water so to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubic foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85–100 of an inch or 85–100 of one-fortieth of one cubic foot per second per acre for the total number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the aggregate number of acres of this land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers, or others than the Indians in the event that said lands are released from the

reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

CLAIM No. 2. In addition to water for the above mentioned 3,130 acres of Pyramid Lake Indian Reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for the irrigation of 2,745 acres of Pyramid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers, or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

DERBY DAM AND TRUCKEE CANAL

CLAIM No. 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the

Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in SW¼ of Section 19, in T. 20, N., R. 23, E., Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government had expended for this project $6,252,000.00. The lands so withdrawn for reclamation are naturally dry and arid and without the application of water are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on

the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

LAKE TAHOE STORAGE

CLAIM NO. 4. Under the Reclamation Act and for irrigation and other beneficial uses on lands under said project and on lands within the basins of the Truckee, Carson and Humboldt rivers in Washoe, Storey, Lyon, Churchill and Humboldt counties, in the State of Nevada, and pursuant to notice posted, by direction and authority of the Secretary of the Interior and for and on behalf of the United States, on the right bank of the Truckee River at the site of the dam in said river near Tahoe City and in Placer County, California, and about 500 feet downstream from Lake Tahoe, on the 21st day of [illegible], 1903, plaintiff is entitled to, and is allowed with a priority of that date and during all seasons of the year, to have flow into and to hold and store in Lake Tahoe and in a reservoir made of said lake by a dam at said site in said river constructed with the spillway crest thereof six feet above the floors of the flow-ways of said dam as then existing, all waters of or

coming into said river or said lake, both surface and under flow, to the extent of 3,000 cubic feet per second and to the extent of the capacity of said lake as a reservoir made by said dam, to said height and subject to the continuous out-flow through said river from said lake or reservoir so made by said lake or dam, of such an amount of water as plaintiff may desire to release or may discharge from said lake or reservoir not exceeding at any time a flow of 3,000 cubic feet of water per second.

In addition to the above specified rights, the United States is entitled to store, discharge and control water in Lake Tahoe as provided in the judgment and decree filed and entered on June 4, 1915, in the case of the United States, plaintiff, versus The Truckee River General Electric Company, a corporation defendant, in the District Court of the United States in and for the Northern District of California, Second Division, and subject to said decree the United States shall be entitled to discharge from Lake Tahoe an amount of water sufficient to deliver to the head of the Truckee Canal at the Derby Dam, after transportation loss, 1,500 cubic feet per second. The plaintiff is entitled and allowed at will to release and discharge any of the water stored, or by this decree allowed to be stored, in Lake Tahoe and to flow the same and any other water to which it is entitled, according to its priority, through the Truckee River to the Derby Dam and there divert the same through the Truckee Canal for irrigation, for storage in the Lahontan Reservoir, for generating power and for other purposes. The

rights of said defendant Sierra Pacific Power Company (formerly The Truckee River General Electric Company) under said judgment and decree are hereby recognized and confirmed.

UNITED STATES OF AMERICA,
District of Nevada, ss:

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the above and foregoing is a full, true, and correct copy of those portions of the Final Decree filed and entered September 8th, 1944, in the case of *United States of America, Plaintiff*, v. *Orr Water Ditch Company, et al., Defendants*, In Equity No. A-3, which said portions are all the portions of said Final Decree relating to claims of the United States of America.

I further certify that this said Final Decree was signed by Honorable Frank H. Norcross, U. S. District Judge for the District of Nevada, on September 8th, 1944; that said Final Decree was filed and entered on the same date; that no notice or petition for appeal, or motion for new trial has been filed in this proceeding in this office.

I further certify that the aforesaid portions of said Final Decree, and the Final Decree, is in the same proceeding as the Temporary Restraining Order, filed and entered February 13, 1926, and Special Master's General Explanatory Report, referring among other things, to "Government Ownership—State Control," filed June 13, 1925, in the case known as *United States of America, Plaintiff*, v. *Orr Water Ditch Company, et al., Defendants*, In Equity No. A-3.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at my office in Carson City, Nevada, this 15th day of December, A. D. 1944, and in the year of our Independence the 168th.

O. E. BENHAM,
Clerk.

By (S) O. F. PRATT,
Chief Deputy.

APPENDIX IV

STATE OF COLORADO,
County of Montrose, ss:

I, Clide N. McClean, Clerk of the District Court within and for the county in the State aforesaid, do hereby certify that, in Case Number 1745, in said Court, being "in the matter of the supplemental adjudication of priorities of water rights in water district [sic] No. 62, State of Colorado, on the petition of the Cimarron and Uncompahgre Vallen [sic] Canal and Reservoir Company; that S. V. Hobaugh was, on March 22, 1913, the duly appointed, qualified and acting Referee in said cause; and that on said date the said S. V. Hobaugh as such Referee, filed in said District Court, his Findings on the claims for the appropriation of water in said Water District involved in said cause; that the general preliminary portion of said Findings, and that portion thereof pertain-

ing to The Uncompahgre Valley Project No. 110, Priority No. 111¼, is as follows, to wit:

In the District Court

STATE OF COLORADO,
County of Montrose, ss:

IN THE MATTER OF THE SUPPLEMENTAL ADJUDICATION OF PRIORITIES OF WATER RIGHTS IN WATER DISTRICT NO. 62, STATE OF COLORADO, ON THE PETITION OF THE CIMARRON AND UNCOMPAHGRE VALLEY CANAL AND RESERVOIR COMPANY

FINDINGS OF THE REFEREE

To the Honorable THOMAS J. BLACK:

Judge of the District Court, on the Seventh Judicial District, of the State of Colorado, sitting in and for the County of Montrose.

The undersigned, S. V. Hobaugh, Referee in the above entitled matter, from the evidence submitted therewith [sic], as to the several ditches in Water District No. 62, State of Colorado, for which Statements of Claim were filed with the undersigned as such Referee, doth Find as follows:

That all the Ditches and Canals, hereinafter mentioned, divert their water from Water District No. 62, in the State of Colorado, and from the Gunnison River and its tributaries, in said Water District.

The Referee Finds, that this is a supplemental adjudication, in said Water District, No. 62; that there was an original adjudication in said

District, on March 28th, 1905, wherein, the ditches that came in at that time received numbers up to, and including No. 109, and appropriations of water, and the referee, in order to avoid confusion, has given numbers to the Ditches in this adjudication, that have not already been numbered in the original adjudication, beginning with No. 110.

* * * * *

THE UNCOMPAHGRE VALLEY PROJECT No. 110

Priority No. 111–¼

The said Project is claimed by the United States of America. That the name of said Project is the Uncomphagre Valley Project, or the Gunnison Tunnel & South Canal Project.

Said project is situated in the Counties of Monrose and Delta, State of Colorado, Water District No. 62–40 and 41. Said Project is being built under the provisions of the Act of Congress, approved June 17, 1902 (32 Statutes 388), known as the Reclamation Act, and Acts amendatory thereof and Supplemental thereto, and is now in process of construction, but not as yet completed. That the United States on, to wit, Jan. 31st, 1902, reserved from further appropriation and set aside for Governmental, reclamation and irrigation purposes, such an amount of the then unappropriated waters of the Gunnison and Uncompahgre Rivers and their tributaries, as would be sufficient and necessary for the reclamation and proper irrigation of the lands embraced within said Project, and to be reclaimed and irrigated thereby.

The Referee finds that construction was begun in the way of surveys, on June 1st, 1901, and has been prosecuted with due diligence since above date, and that the nature of the work has been of great difficulty of construction.

That the Gunnison Tunnel & South Canal are almost completed; that the present carrying capacity of said tunnel and canal, as now constructed, is 1,300 cubic feet of water per second of time.

That the 13th General Assembly of the State of Colorado, passed House Bill No. 195, duly approved April 11, 1901, providing for the construction, maintenance and operation of State Canal No. 3 in Montrose and Delta Counties, Colorado, the creation of a State board of control; the issuance of certificates of indebtedness and providing for the sale of water and making an appropriation for construction. Said State Canal No. 3 was designed to divert water from the said Gunnison River by a tunnel with which to irrigate the same lands in said Montrose and Delta counties as are now included in the said Project of the United States, known as the Uncompahgre Valley Project above referred to.

That on December 30th, 1901, in compliance with the laws and regulations of the State Engineer's Office, a preliminary map and statement claiming an appropriation of 1,500 cubic feet of water per second of time of the waters of the Gunnison River, for irrigation purposes, was filed by said state board of control.

That the 14th General Assembly, of the State of Colorado, passed H. B. No. 75, duly approved,

March 16th, 1903, concerning State Canal No. 3, providing that the State of Colorado release, and relinquish to the United States of America, all right, title and interest, in and to State Canal No. 3; and all right and privileges acquired in connection therewith.

That the deed of cession was duly made, August 14th, 1906, to the United States, whereby, all rights, title, claim, or interest of the State of Colorado and State Board of Control, of said State Canal No. 3, was fully released, relinquished and conveyed to the United States, together with all rights and privileges in connection therewith. Referred to in said Act, approved March 16th, 1903.

That said Project or Canal diverts its supply of water from the Gunnison River, through a tunnel.

That the headgate of the said Project and tunnel is located at a point on the left bank of the Gunnison River, whence the S. E. corner of Section 12, Tp. 49 N., R. 8 W., N. M. P. M. bears south 69°45'24" west of 26,396.6 feet.

From the headgate said tunnel extends in a southwesterly direction 20,581.9 feet. Said tunnel is 11 feet wide at spring line of arch, 10 feet wide at the bottom, has an average area of 117.65 square feet inside of concrete, and grade of 2.08 feet per 1,000 feet a capacity of 1,300 cubic feet per second of time.

That the South Canal connects with Tunnel and conducts the waters to the various distributing laterals of the distributing system. The depth of said Canal is 13 feet; the width on top, 70 feet; width on the bottom, 40 feet; grade, 0.12 feet per 1,000 feet, and extends in a southerly direction,

63,229 feet, and has a carrying capacity of 1,300 cubic feet per second of time. Said South Canal delivers all or a part of said water into the Uncompahgre River and its tributaries, which are in turn used as a part of the distributing system of said project.

Waters are diverted through said Tunnel and Canal, and used for irrigation purposes, in irrigating approximately 140,000 acres of land lying in said Montrose and Delta counties.

The Referee further finds that actual construction work, in the way of excavation, was begun on said Tunnel and Project, about 1904, and has been prosecuted with due diligence ever since said date.

The Referee further finds that during the irrigation season of 1911, 250 cubic feet of water was run through said tunnel and canal, and used for beneficial purposes as above mentioned.

That in 1912, during the irrigation season, some 200 cubic feet was run through said tunnel and canal.

The Referee finds that the said Uncompahgre Valley Project or Gunnison Tunnel and South Canal is entitled to Priority No. 1234, of date June 1st, 1903, and in amount of thirteen hundred (1,300) cubic feet of water per second of time of the waters of the Gunnison River and its tributaries.

* * * * * *

And I do further certify that on the 8th day of May, A. D. 1914, Donald Cadzow was duly sworn as a witness in said cause, and testified as follows, to-wit:

* * * * * *

in said Cause No. 1745, being in The Matter of The Supplemental Adjudication of Priorities of Water Rights in Water District No. 62, State of Colorado, On the Petition of the Cimarron and Uncompahgre Valley Canal and Reservoir Company; and that in said Decretal Order, the following proceedings, among others, appear of record, to wit:

* * * * * *

Subject to the several last mentioned provisions, it is further, as to the said several ditches and canals, and the several appropriations of water by means of them respectively claimed in this matter, ordered, adjudged and decreed in accordance with the findings of said Referee, as follows:

That the ditches in said Water District No. 62, for which statements of claim have been filed with the Referee, be, and they are hereby numbered, and the number of their respective appropriations, with the date thereof, the number of cubic feet of water per second of time, and the stream from which water is taken, are hereby determined and decreed to be as follows:

No. 110. Ditch name: The Uncompahgre Valley Project. Name of stream: Gunnison River. Appropriation: No. 111¼; Date, June 1, 1901; amount, 1,300.

* * * * * *

And more particularly with reference to the ditches taking water from the various natural streams in said Water District No. 62, it is hereby ordered, adjudged and decreed that the ditches taking their supply of water from their respective natural streams in said Water District No.

62, and their respective numbers, priority numbers, dates of appropriation, and number of cubic feet of water per second of time, are hereby determined and decreed to be as follows:

From the Gunison River, a natural stream, in said Water District No. 62, as follows:

No. 110. Ditch name: The Uncompahgre Valley Project. Appropriation: No. 111¼; date, June 1, 1901; amount, 1,300.

* * * * *

And more particularly with reference to the several ditches heretofore mentioned, the Referee doth find as follows:

THE UNCOMPAHGRE VALLEY PROJECT OF THE GUNNISON TUNNEL & SOUTH CANAL PROJECT

(No. 110)

Priority No. 111¼

That said Uncompahgre Valley Project or Gunnison Tunnel and South Canal is entitled to Priority No. 111¼ of date June 1, 1901, and it is hereby ordered, adjudged and decreed, that there be allowed to flow in said tunnel and canal from the Gunnison River and its tributaries for the use and benefit of the parties lawfully entitled thereto, and by virtue of the acts of the General Assembly of the State of Colorado, and the work done by the State of Colorado, upon State Canal No. 3, and by virtue of the act of Cession by said General Assembly and the Deed of Cession of the State of Colorado to the United States for State Canal No. 3 and all rights connected therewith, and by virtue of the assertion and claim of the United States of its right to the use of the unap-

propriated waters of the Gunnison River and its tributaries, and by virtue of actual appropriation and original construction of the Uncompahgre Valley Project or Gunnison Tunnel and South Canal and said Priority No. 111½ of date June 1, 1901, so much of the water of the said Gunnison River and its tributaries as will flow into said tunnel, not to exceed thirteen hundred (1,300) cubic feet of water per second of time; and it is hereby further ordered, adjudged and decreed that so much of said water so appropriated and diverted from the said Gunnison River through the said tunnel and canal as may flow into or be discharged into the Uncompahgre River and its tributaries, a part of the distributing system of said project, shall be allowed to flow in said Uncompahgre River and its tributaries for the sole use, diversion, and benefit of the said project.

The above decree is subject however to the prior decree of November 1st, 1905.

* * * * *

By the Court,

(S) CHAS. CAVENDER,
Judge.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court at Montrose, Colorado, this 24th day of April A. D. 1942.

[SEAL] (S) CLIDE N. McCLEAN,
Clerk of the District Court.

STATE OF COLORADO,
County of Montrose, ss:

I, Clide N. McClean, Clerk of the District Court in and for the County in the State aforesaid, do

hereby certify the above and foregoing seven and a fraction pages to be a full, true and complete copy of certification under my hand and seal on the 24th day of April, A. D. 1942; that said certification is a full, true and correct copy of the records therein referred to with the exception of the following three typographical errors, to-wit: in the center of line five (5) of page one (1) the word "Districe" in the original record is "District"; in line six (6) said page one (1) the word "Vallen" in the original record is "Valley," and in next to the last line on said page one (1) the words "therewit" in the original record is "therewith."

In witness whereof I have hereunto set my hand and affixed the seal of said District Court at Montrose, Colorado, this 26th day of December A. D. 1944.

[SEAL] (S) CLIDE N. McCLEAN,
Clerk of the District Court.